





ENTERED  
MAR 15 1968  
MB

F 2302

# San Francisco Law Library

436 CITY HALL

No. 188196


## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov















---

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 21082**

---

DAVID MACHADO,  
*Appellant,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

---

J. B. TIETZ AND

MICHAEL HANNON

410 Douglas Building

257 South Spring Street

Los Angeles, California 90012

*Attorneys for Appellant*

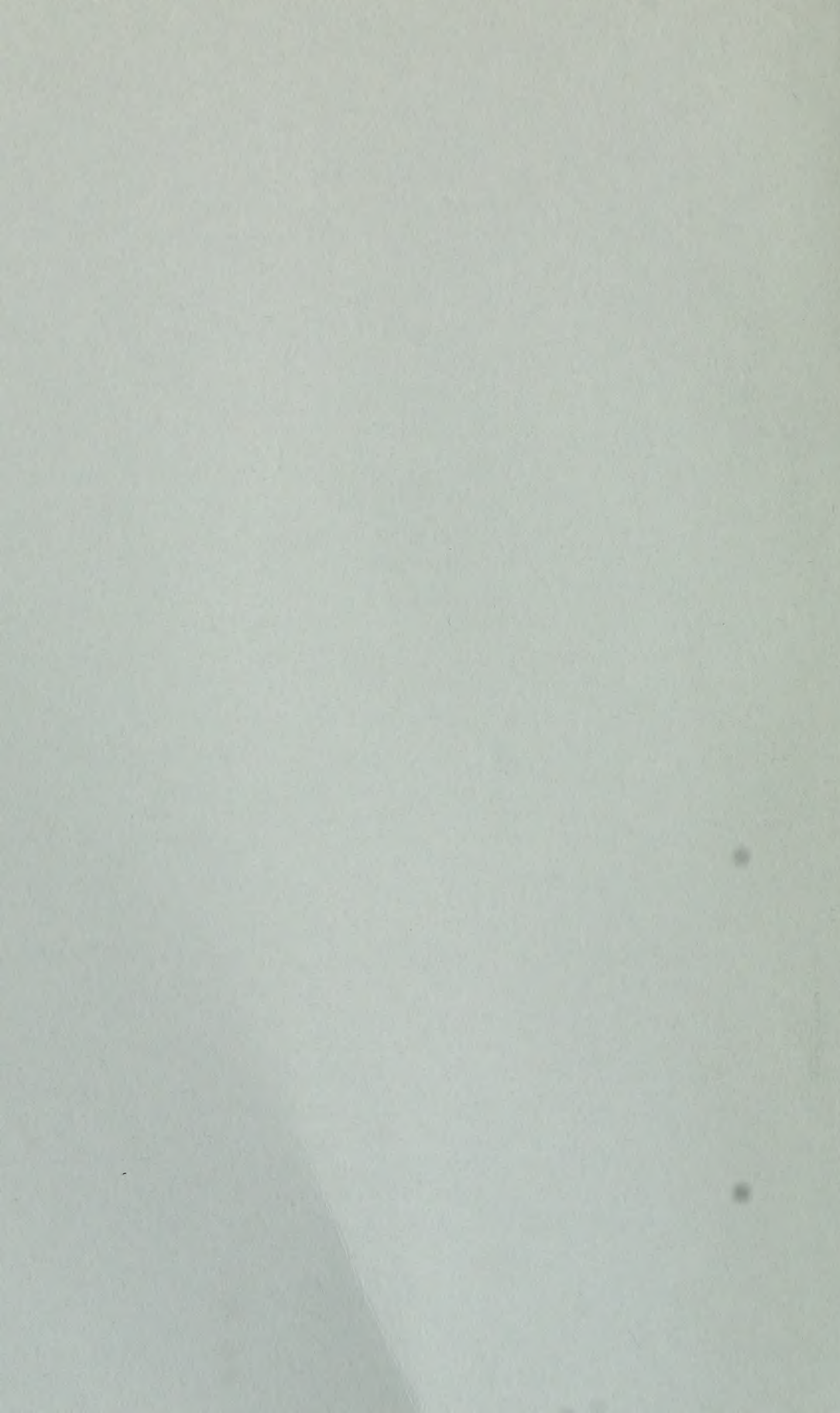
**FILED**

**FEB 14 1967**

**WM. B. LUCK, CLERK**

**FEB 14 1967**





## INDEX

Jurisdiction .....	1
Statement of the Case .....	2
The Facts .....	2
Questions Presented and How Raised .....	5
Specification of Errors .....	6
Summary of Argument .....	6
Argument—	
I. There Was No Basis in Fact for the Rejection of Appellant's Claim to a Conscientious Objector's Classification .....	7
1. Appellant's Agnosticism Is Not a Basis in Fact to Reject His Claims .....	9
2. The Hearing Officer's Bare Statement That Appellant Was Insincere Is Not a Sufficient Basis in Fact .....	12
II. Appellant Was Denied Procedural Due Process by the Manner in Which the Hearing Officer's Hearing Was Conducted .....	19
III. The Evidence Was Insufficient to Convict Appel- lant in That It Appears Without Contradiction That Appellant Was Not Given a Physical Exami- nation Within One Year of the Induction Date, a Denial of Due Process .....	21
IV. The Evidence Was Insufficient to Convict Appel- lant in That It Shows That He Was Not Given an Opportunity to Review Form DD 98 As Re- quired by Army Regulations .....	24
Conclusion .....	26



## TABLE OF CASES

<i>Annett v. United States</i> , 205 F.2d 689 .....	12, 16, 17
<i>Dickinson v. United States</i> , 346 U.S. 389, 74 S. Ct. 152	
<i>Estep v. United States</i> , 1946, 327 U.S. 114, 66 S. Ct. 423 ..	26
(1953) .....	8, 9, 12
<i>United States v. Falbo</i> , 1944, 320 U.S. 549, 64 S. Ct.	
346 .....	25
<i>United States v. Israel Feuer</i> , 25778-WM, S. D. Calif. ....	25
<i>United States v. Seeger</i> , 380 U.S. 163, 85 S. Ct. 850 .....	
.....	10, 11, 13, 14, 18
<i>Williams v. United States</i> , 216 F.2d 350 (5th Cir.,	
1954) .....	9, 12

## OTHER AUTHORITIES

Army Regulations 601-270 .....	23, 24
32 C.F.R. 1622.14 .....	7
32 C.F.R. 1628.10 .....	22
Section 6(j), Title 1, Universal Military Training and	
Service Act .....	8

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 21082**

---

DAVID MACHADO,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

---

**JURISDICTION**

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California, Central Division.

The appellant was sentenced to the custody of the Attorney General for a period of three years after conviction on one count on an indictment for violation of 50 U.S.C.



App. 462: Universal Military Training and Service Act: Refusal to be Inducted [CT 6].<sup>1</sup> Title 18, Section 3231, United States Code, conferred jurisdiction in the District Court over the prosecution of this case. Thus the Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37(A) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed in the time and manner required by law [CT 7].

### **STATEMENT OF THE CASE**

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Appellant pleaded not guilty and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. Appellant was found guilty [CT 5] and sentenced to imprisonment for a period of three years [CT 6].

An oral Motion for Judgment of Acquittal [RT 39,<sup>2</sup> lines 1 to 14] was made during the trial.

### **THE FACTS**

Appellant registered with his local board on October 14, 1958, as required by the Act. [Ex. 3].<sup>3</sup> At that time he did not claim exemption as a conscientious objector. He received a pre-induction physical examination on May 3, 1963 [Exs. 125, 126], and again on May 11, 1964 [Exs. 123, 124].

---

1. CT refers to Clerk's Transcript.

2. RT refers to Reporter's Transcript.

3. Ex. refers to the plaintiff's exhibit, the complete Selective Service System file of the appellant.

On November 29, 1963, appellant sent his local board a letter which stated: "Please send me the necessary forms for a change in classification. My convictions against killing my fellow man prevents me from bearing arms." [Ex. 43]. Appellant submitted a completed Special Form for Conscientious Objectors to his local board on December 16, 1963 [Exs. 45 to 48].

On that form, appellant did not check either "yes" or "no" following Question 1 of Series II, "Do you believe in a Supreme Being?" He wrote instead the words, "I do not know." Below this, he wrote, "I believe in a Supreme order which is responsible for all being. This order does not allow me to take human life." [Ex. 45]. Appellant's father is a minister of the Church of God [Ex. 47] and his mother belongs to the same denomination. Appellant explained, "I was trained in the basis for my beliefs from my earliest childhood by my parents and associates. Further, my experiences abroad have reinforced them." [Ex. 46].

Appellant was retained in Class 1-A and appealed. His file was forwarded by the appeal board to the United States Attorney for the purpose of securing an advisory recommendation from the Department of Justice [Ex. 50]. The United States Attorney advised the appeal board, "Investigation reveals that registrant is not a conscientious objector but an agnostic, not believing in God as a Supreme Being." [Ex. 51]. The appeal board thereupon classified appellant 1-A [Ex. 52].

Appellant then asked for an appearance before his local board [Ex. 54] and was granted an "interview" on



June 11, 1964 [Exs. 58 and 59]. At this interview, appellant stated that he believed it was wrong to kill, that "He believed in a Supreme Order and it was sinful to kill." The board replied that "a conscientious objector's classification was based on belief in a Supreme Being and that they noted from his file that he did not know whether he believed in a Supreme Being." The board told registrant that he had no further right of appeal and decided not to reopen his classification [Exs. 59 and 60].

Appellant retained an attorney, Mr. Daniel G. Marshall, who wrote to Selective Service pointing out that during his appeal, appellant had not been granted the Special Appellate Procedures required by the Act, specifically, a hearing before a Department of Justice Hearing Officer [Ex. 61]. At the same time, appellant submitted a two page letter outlining his beliefs to the local board [Exs. 62 and 63], dated July 29, 1964, and marked "received" by the local board on August 3, 1964. He also requested a reopening of his classification [Ex. 64].

The Appeal Board reopened [Exs. 65, 66, 67, 68 and 71]. This time, appellant was given a hearing before a Hearing Officer whose report is found in the Exhibit at pages 72 through 85. A statement of fact and law, in reply to the Hearing Officer's recommendations, was filed by the appellant's then attorney, Daniel G. Marshall, and is found in the Exhibit at pages 89 through 96.

On October 8, 1965, appellant filed a student's certificate with his local board [Ex. 99]. On October 28, 1965, the Appeal Board again voted to classify appellant 1-A [Ex. 100].

Appellant was ordered to report for induction on December 21, 1965 [Ex. 104]. He reported as ordered but refused to submit to induction [Ex. 112].

On the induction date, appellant was given no physical examination [Exs. 116, 121, 122 and see argument below]. Also, he was not given an opportunity to review and re-execute Form DD98, the Security Questionnaire [Exs. 138 to 141].

## **QUESTIONS PRESENTED AND HOW RAISED**

### **I**

Was there a basis in fact for rejecting the classification claims of appellant? This question was raised by the denial of the motion for judgment of acquittal.

### **II**

Was appellant denied due process by the manner in which the Hearing Officer's hearing was conducted? This question was raised by the records on file in this case.

### **III**

Was the appellant denied due process of law by the Induction Station's failure to give him a physical examination on the date of induction or within one year prior to induction as required by 32 Code of Federal Regulations, Section 1628.10 and Army Regulation AR 601-270? This question was raised by the records on file in this case.

### **IV.**

Was the appellant denied due process of law by the Induction Station's failure to give appellant an opportunity to fill out DD Form 98, Security Questionnaire, prior to ordering him to submit to induction? This question was raised by the records on file in this case.



## **SPECIFICATION OF ERRORS**

### **I**

The District Court erred in denying the motion for judgment of acquittal

### **II**

There was insufficient evidence to support a finding of guilty in that the government's chief evidence was the Exhibit, the appellant's Selective Service file, which contains un rebutted evidence of two manifest denials of due process of law in the procedure of the Armed Forces Entrance and Examining (Induction) Station in this case.

## **SUMMARY OF ARGUMENT**

### **I**

There was no basis in fact for appellant's 1-A classification. He filed a form for conscientious objectors and thereby made out a prima facie case for a 1-O classification. There was no question raised about appellant's veracity. His agnosticism was not a proper reason for rejecting his claims. The Hearing Officer's bare statement that appellant was insincere was not grounded upon any facts revealed in the record and the decided cases hold that an unsupported opinion is not evidence.

### **II**

The Hearing Officer's effective denial of appellant's right to have both his witnesses testify at the hearing was not supported by the regulations and was a denial of due process.

### III

The failure to give appellant a physical examination on the induction date or within one year of the induction date was in violation of the applicable regulations and deprived appellant of the opportunity to avoid the induction order by being found physically unfit for service. This deprived appellant of due process.

### IV

The failure to give appellant an opportunity to review and re-execute the Security Questionnaire, Form DD 98, on the date of induction or within one year prior thereto was likewise in violation of the applicable regulations and deprived appellant of due process.

## ARGUMENT

### I

#### **There Was No Basis in Fact for the Rejection of Appellant's Claim to a Conscientious Objector's Classification.**

Appellant claimed 1-O classification. 32 C.F.R. provides for such classification.

“1622.14 Class 1-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class 1-O shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.”

Authority for this regulation is derived from Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended, which provides in part as follows:

“Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall **not be bound to follow**, the recommendation of the Department of Justice together with the record on appeal from the local board.”

In *Dickinson v. United States*, 346 U.S. 389, 396, 74 S. Ct. 152, 157 (1953), the court stated:

“The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board’s overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities.”



The District Court Judge in the instant case stated that it appeared to him that there was “ample basis in fact for the determination” [RT 133, lines 10 to 13] but he did not state the foundation for that observation nor refer to anything in the evidence that might constitute such a basis in fact.

*Williams v. United States*, 216 F.2d 350 (5th Cir., 1954), was a draft refusal case in which the conviction was reversed for the failure of the evidence to disclose any basis in fact for the undesired classification determination. After quoting the language recited above from *Dickinson*, the Court stated:

“The District Court states that it found such evidence but failed to state what it was. After a diligent search, we have found none.” (Page 351). “If there was no evidence before the board to refute the defendant’s professed belief and if that belief was sincere on his part, then under the Act of Congress, he was exempt from training and service. As stated, we have found no such evidence in the records. A thorough reading of the record casts no doubt on the appellant’s sincerity.” (Page 352).

Thus in *Williams*, the Court went behind the ipse dixit of the District Court and made its own examination of the record to determine if any basis in fact was present and, finding none, reversed the conviction.

# **1. Appellant’s Agnosticism Is Not a Basis in Fact to Reject His Claims.**

In the instant case, a close reading of the record of the administrative procedures shows one pervading theme, appellant’s agnosticism. It was cited by the United States

Attorney, on the first appeal [Ex. 51], as his sole reason for a negative recommendation. It was referred to by the appellant's local board during his interview [Ex. 58]. The Hearing Officer, at the second appeal, wrote in his recommendations:

"The Resume of the Inquiry as a whole is less than persuasive with respect to registrant's religious objections to military service.

"Registrant's SSS Form 150 is little more than a bare assertion of a conscientious objector claim. In response to Question 1 of Series 11, 'Do you believe in a Supreme Being?', The registrant answered, 'I do not know'...."

The leading opinions in this area of the law are the consolidated cases *Seeger*, *Jacobson* and *Peter* (all reported sub nom. *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850). The convictions in *Jacobson* and in *Seeger* had been reversed by the Court of Appeals for the Second Circuit, in the former case because the defendant's beliefs in "Godness" (a "horizontal" as opposed to a "vertical" belief) as "The Ultimate Cause for the fact of the Being of the Universe" was sufficiently a "belief in relation to a Supreme Being" to qualify (325 F.2d 409) and in the latter case because the "Supreme Being" requirement created, in the opinion of the Second Circuit, "An impermissible classification" (326 F.2d 846). On the latter point, the Second Circuit had held:

"... it now seems well established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions."

In *Peter*, the Supreme Court reversed a conviction (sustained by the Ninth Circuit) where the defendant had failed to execute the Conscientious Objector portion of the Classification Questionnaire but attached a quotation expressing opposition to war in which he stated he concurred and, later, hedged the question of belief in a Supreme Being, on the Special Form for Conscientious Objectors, by stating that it “depended on the definition” and appended a statement that he felt it a violation of his moral code to take a human life and that he considered his belief superior to his obligation to the state.

In sustaining the decision of the Second Circuit, reversing the conviction of *Seeger*, the Supreme Court avoided a declaration of the unconstitutionality of the Supreme Being classification by holding that Seeger’s beliefs, too, were to him sufficiently “beliefs in relation to a Supreme Being” to qualify.

Seeger had altered the oath on the Special Form for Conscientious Objectors, which reads, “I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form.” to “I am, by reason of my ‘religious’ belief, conscientiously opposed to war in any form.” To the Supreme Being question, he answered that “The existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open, rather than answer ‘yes’ or ‘no’”. Rejecting dependence on a Creator for a guide to morality, Seeger asserted “more respect for \* \* \* belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”



In the case presently before this Court, the appellant signed the oath without any alteration, basing his claim on "religious training and belief." He described his belief as one in "A Supreme order which is responsible for all being" and which "does not allow me to take human life." Such a statement is not even the outright agnosticism of Seeger but more akin to the "Godness" which Jacobson described as "The Ultimate Cause for the fact of Being of the Universe." In the light of these decisions, the appellant's belief should be held to be within the scope of the "Supreme Being" classification as a matter of law and no basis in fact for rejection of his conscientious objection claims.

## **2. The Hearing Officer's Bare Statement That Appellant Was Insincere Is Not a Sufficient Basis in Fact.**

The Selective Service System raised no question (none is recorded) concerning the veracity of the appellant. The question therefore is not one of fact, but is one of law; *Dickinson v. United States*, 346 U.S. 389 (1953). The law, and the facts in his file, at least *prima facie*, establish that appellant is a conscientious objector opposed to both combatant and non-combatant military service.

If a Court of Appeals, as in *Williams* (see *supra*), will not accept the ipse dixit of a District Court Judge, should the unsupported statement of a mere hearing officer stand upon higher ground?

In *Annett v. United States*, 205 F.2d 689, 691, the Tenth Circuit commented:

"To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence."

The Hearing Officer's report [Exs. 72 to 85] states, "The Department of Justice concludes that the registrant is not sincere in his claim and recommends to your Board that his conscientious objector claim not be sustained." [Ex. 75].

The report does not say anything at all about appellant's demeanor or manner of answering at the hearing. It does, however, make several observations about appellant prior to stating this conclusion. These will now be examined, each in turn, to see if any possible basis in fact to support denial of the classification or any possible basis in fact to support the allegation of insincerity can be found therein.

The Report states:

"Registrant was born October 13, 1940 in New York City. His parents are members of a Pentecostal Church, but the registrant claims membership in no religious organization. He graduated from high school in June, 1958, ranking 334 in a class of 557. He is currently attending Los Angeles City College, Los Angeles, California. In his SSS Form 100, filed in the Fall of 1961, registrant did not claim exemption as a conscientious objector. In his SSS Form 150, filed December 16, 1963, registrant claimed exemption from both combatant and non-combatant military training and service. The registrant's local board classified him 1-A and he appealed that classification." [Ex. 72].

The fact of non-membership in any religious organization is no factual basis for concluding that appellant is not a bona fide conscientious objector. None of the three young men involved in *Seeger* (see *supra*) were members

of any organized religious group. This fact is irrelevant negatively, although it may help a fact-finder affirmatively.

The fact of his parents' membership in a Pentecostal Church does not gainsay but rather supports the idea that appellant's beliefs are the product of "religious training" even if appellant has later parted company with some or all of the doctrines of the Pentecostal Church and with its organizational form.

The fact that appellant's Form 150 was first submitted two years after he filled out his classification questionnaire sheds no light on his sincerity or lack thereof. See-ger claimed his status as a conscientious objector for the first time four years after he was first classified. In Jacobson's case it was five years (380 U.S. 163, 167, 85 S. Ct. 850, 855) and in Peter's case, it was one year (324 F.2d 173, 174).

The other facts stated in the paragraph quoted above are patently irrelevant to the question in issue.

The next pertinent part of the Hearing Officer's Report [Ex. 73] states:

"Registrant appeared before the Hearing Officer in Los Angeles, California on May 26, 1965, accompanied by his father. The registrant told the Hearing Officer that he had no criticism of the Resume of the Inquiry. The registrant stated that he believes in the teachings of Christianity but does not belong to any specific church. He told the Hearing Officer that he began to think about his values and attitudes at the age of 19, right after he had obtained his first draft notice. He then wanted to determine what he should do regarding his military status and, in order to as-



sist him in making up his mind, he made a trip to a number of foreign countries, spending approximately ten months in Israel. He explained that it was not until the fall of 1963, that he had fully made up his mind and that at that time he determined that he could not conscientiously be a part of any war effort or kill any human being. When the Hearing Officer closely questioned him concerning his attitude regarding physical defense in the event of an attack the Hearing Officer reported that it became apparent to him that the registrant had still not been able to fully determine his state of mind, and registrant indicated that his actions, at any such time, had to be guided by his emotions. The Hearing Officer pointed out that only when the registrant received his first draft notice did he begin to search his mind as to whether he would enter the military service. He advised that registrant has still not fully made up his mind as to whether he would physically defend himself and his family in the event of an invasion. The Hearing Officer concluded that the registrant is not sincere, either in his beliefs or intentions, and he found that the registrant does not conscientiously oppose participation in combatant and noncombatant service in the Armed Forces. He recommended that the appeal of the registrant based on conscientious objection be not sustained" [Exs. 73, 74]

Nonmembership in any specific church has been dealt with above. Foreign travel—even "ten months in Israel"—in no way casts a shadow of reasonable doubt on his sincerity.

The fact that appellant was nineteen when he first began to seriously consider the question of whether he would serve in the armed forces and the fact that this trend of

thought was precipitated by the arrival of his first draft notice logically tend to reinforce, rather than to weaken, appellant's position.<sup>4</sup> Can it be said, with any respect for reason, that a decision arrived at after five years of thoughtful consideration is of less worth than some precipitous conversion? The other possible interpretation is an inference by the Hearing Officer that the law requires conscientious beliefs to be formed in their entirety, during the immaturity of childhood and that such beliefs arrived at by the adult man are invalid. Both of these possible inferences demonstrate application of the wrong standard. There is no connection in logic or reason or experience between the issue in question and the Hearing Officer's conclusion that appellant lacked sincerity. Thus they cannot supply a basis in fact.

The Hearing Officer's statement that he closely questioned appellant about his attitude to physical defense in the event of an attack and that he concluded that appellant had not fully made up his mind on the subject indicates that the Hearing Officer was applying a standard of absolute pacifism as the touchstone of bona fide conscientious objection and doubting appellant's sincerity because appellant did not come up to this improper standard.

Again, the *Annett* case (see *supra*) bears a striking analogy to this one in that the Hearing Officer there stated a disbelief in defendant's sincerity based upon Annett's statement that he would kill in defense of his own life.

---

4. This event was on October 14, 1958 [Ex. 3], when appellant was 19 years of age. His first claim for conscientious objector status was made November 29, 1963 [Ex. 43], five years later.

That Hearing Officer likewise hedged by saying that this answer caused him to doubt the sincerity of defendant's conscientious objection rather than flatly stating that he did not believe a person of such beliefs should be allowed to be a conscientious objector. The Court noted in *Annett* that the Hearing Officer had "Applied an erroneous standard" (205 F.2d 689, 691) and said:

"The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good faith religious scruples based on the teachings of his church against the command of his country to go to war and kill therein."

In the instant case, we do not have the benefit of a verbatim transcript of this inquiry but only the Hearing Officer's paraphrased conclusions. The appellant said, as paraphrased by his inquisitor, that his actions in the event of an attack would be guided by his emotions. This honest admission that, despite his conscientious objections to war in any form, a situation of peril to his immediate family might overcome his commitment, is another statement whose logical implications are a ringing endorsement of appellant's sincerity. How easy it would be for an insincere person to espouse, for the sake of the moment, a position of absolute conviction in his ability to remain non-resistant under even the most extreme situations. The fact appellant did not do so is a testimonial to his sincerity.

The fact that the Hearing Officer grasped at this straw with such tenacity, coupled with the fact that he kept repeating that appellant was not a member of a church and that appellant had stated "I do not know" to the Supreme Being question, shows that these latter considerations were



uppermost in the Hearing Officer's mind. This is reinforced by the Hearing Officer's statement at the hearing, as testified to by appellant, without rebuttal. He said that appellant "was not like the other cases that came by, and that (he) did not believe in a religion as a Jehovah's Witness does" [RT 53, lines 20 to 22].

This hearing was held in August, 1965. The *Seeger* case was decided in May, 1965. The Hearing Officer must be presumed to know the law he is supposed to be applying, so he knew that agnosticism is not antithetical to conscientious objection. Yet he did not refrain from citing evidence of agnosticism as evidence against appellant, and then garnishing it with an unsupported allegation of insincerity.

This becomes even more clear in his summing up. He says the resume "As a whole is less than persuasive" yet the resume attached [Exs. 77 to 85] contains not a single derogatory statement about appellant and many affirmative endorsements of the sincerity of his belief. The Hearing Officer says "He never gave public expression to his views (Question 7)", yet this statement is repeatedly contradicted by the statements of informants in the very resume he groundlessly dismisses.

His zeal to find some iota of evidence for his assertion of insincerity becomes overt in his manifest overstatement when he says "conscientious objection seems not to have been thought of until induction became imminent." The "imminence" of induction was the fact that appellant first thought seriously on the subject at age 19 when he first received a draft notice. In 1959, the induction age was

23 or 23-1/2. Only after the Vietnam escalation did it descend. He then recites that appellant "never gave public expression to his views" when the resume that the Hearing Officer attached to his report itself shows seven different informants who stated that appellant had expressed his views against killing to them [Exs. 77 to 85], including a professor at Los Angeles City College who told of appellant's speech on the topic "Thou Shalt Not Kill".

Thus the report of the Hearing Officer contains no basis in fact but simply the Officer's ipse dixit.

Even if some basis in fact could be found for the Hearing Officer's conclusion that appellant was insincere, the Appeal Board that acted upon the Hearing Officer's recommendation did not indicate whether it based its decision on the alleged insincerity or upon his agnosticism. The same situation appeared in *Jacobson* (see 380 U.S. 163, 168, 85 S. Ct. 850, 855) where the Supreme Court affirmed the Second Circuit's order directing dismissal of the indictment on that ground.

## II

### **Appellant Was Denied Procedural Due Process by the Manner in Which the Hearing Officer's Hearing Was Conducted.**

Appellant brought two witnesses with him to the Hearing Officer's hearing [RT 49], his father and one Richard Brooks, a personal friend. The witnesses who testified had slightly divergent recollections of what transpired there.

Appellant testified that Mr. Gillins, the Hearing Officer, told him he was allowed to have only one person

come into the hearing room with him [RT 50, lines 20 and 21], that his father accompanied him leaving Brooks outside, that his father spoke on his behalf [RT 53, lines 2 to 4], that Mr. Gillins indicated the moment when the interview was terminated [RT 53, lines 13 to 17] and that he never asked appellant whether he had any other witnesses there to testify on his behalf [RT 53, line 24, to RT 54, line 7]]. Richard Brooks testified that the Hearing Officer told appellant that “You will only be allowed one witness.” And that he was not given an opportunity to testify [RT 71 and RT 72, lines 14 to 24]. Appellant’s father, Frank Machado, testified that the Hearing Officer said “Only one can come in.” [RT 76, line 13] but later testified that he could not recall the exact words [RT 77, line 5].

The Hearing Officer himself testified that he told them that appellant could have only one witness in the hearing room with him “at one time”. When asked why he did that, the Hearing Officer testified that the Department of Justice had so instructed him [RT 83, lines 1 to 11].

The Hearing Officer further testified that he did not ask appellant if he had anyone else to speak on his behalf although he was aware of the fact that appellant had brought another person with him [RT 87, lines 4 to 16].

The pertinent regulations covering Hearing Officer Hearings are in Appendix A, and show that the Hearing Officer didn’t have them in mind, namely, he was not so instructed but was given discretion on the subject. Therefore, we assert he mistakenly, or otherwise, abused his discretion to the detriment of the appellant.



Thus in failing to follow the regulations and in leading appellant to believe that his witness, Richard Brooks, would not be allowed to participate, the Hearing Officer deprived appellant of a full and fair opportunity to establish his sincerity.

### III

#### **The Evidence Was Insufficient to Convict Appellant in That It Appears Without Contradiction That Appellant Was Not Given a Physical Examination Within One Year of the Induction Date, a Denial of Due Process.**

The government's case in chief consisted solely of the appellant's Selective Service file introduced as an Exhibit.

In that file, the following items appear relative to physical examination of appellant:

1. A "Report of Medical History" (Standard Form 88) dated 3 May 62 [Ex. 129].
2. Another "Report of Medical History", dated 11 May 64 [Ex. 127].
3. A "Report of Medical Examination" dated 3 May 63 [Ex. 125].
4. Another "Report of Medical Examination" dated 11 May 64 [Ex. 123].
5. A partially filled out "Report of Medical Examination", undated, and containing no information except appellant's name, address, SSS number, and the name and address of the examining station. Note that the Physical Inspection stamp used customarily on the date of induction appears but is not filled out [Exs. 121 and 122].

6. Three "Record of Induction" forms appear in the file. One shows a medical determination made on 3 May 63 [Ex. 120] and another shows a medical determination made on 11 May 64 [Ex. 118]. The third form has blanks in the medical determination boxes and the words "refused induction" handwritten across the page [Ex. 116].

The induction station customarily grants each inductee a physical inspection on the date of induction before ordering them to submit to induction. In addition, the regulations provide for a physical examination to be made in every case where the pre-induction physical is over one year old.

32 Code of Federal Regulations, Section 1628.10 provides:

"1628.10 WHO WILL BE EXAMINED: Every registrant, before he is ordered to report for induction . . . shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

The appellant's Selective Service file does not show that he was a delinquent or that he volunteered for induction.

This regulation was supplemented by Local Board Memorandum No. 28 of the National Headquarters of the Selective Service System which provided in Paragraph 2 that:

“... (W)hen a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case, the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be immediately inducted.”

Note that the examination is to precede induction.

This Local Board Memorandum was rescinded on August 31, 1961, because “Army Regulations No. 601-270, Personnel Procurement-Armed Forces Examining Stations and Armed Forces Induction Stations, and current changes thereto in loose-leaf form are now distributed throughout the Selective Service System. Signed Lewis B. Hershey, Director”.

The said Army Regulation provides the same except that the maximum period has been extended to one year.

Appellant was ordered to submit for induction on December 21, 1965 [CT 2], more than one year after his last armed forces physical examination on May 11, 1964. He was given no physical examination on December 21, 1965.

Thus the Induction Station failed to follow their own regulations and denied to appellant the opportunity to take a physical examination that could have resulted in his disqualification for military service.

This Court may take judicial notice of the fact that 53 per cent of inductees are rejected as shown by Selective Service News, monthly tabloid-size publication of Selective Service System National Headquarters.



The Induction Station forced appellant into the position where he had to choose between violating his conscience by submitting to military service or to face the chance of a substantial term of imprisonment, without giving him the opportunity that the regulations provide to avoid this dilemma. This was patently unfair to appellant and a denial of due process.

#### IV

### **The Evidence Was Insufficient to Convict Appellant in That It Shows That He Was Not Given an Opportunity to Review Form DD 98 As Required by Army Regulations.**

Army Regulations 601-270, cited above, also provide that inductees shall be required to re-execute the Armed Forces Security Questionnaire, Form DD98, prior to induction, if it is over one year old.

Appellant's file shows that the DD98 was signed by appellant on 3 May '63 [Ex. 141]. On that same page is a stamp that reads as follows:

"I have this date, \_\_\_\_\_, reviewed the contents of DD Form 98 prepared by myself on \_\_\_\_\_ and certify that the statements then made by me are at this time full, true, and correct.

\_\_\_\_\_  
Signature of Witnessing Officer      Signature

In appellant's file, this stamp appears in this form without the blanks filled in. The Regulations provide that if the execution of the DD 98 by the person selected for induction is over 120 days old, an officer shall go over the form with him, have him re-execute the declaration, and sign as a witness.

In a District Court case in this District, the Honorable William C. Mathes had before him a defendant in the same posture as this appellant (*United States v. Israel Feuer*, 25778-WM, S. D. Calif.). In acquitting that defendant, the Judge said:

“This is almost like—ethically at least—A registrant with his record who has vision that just doesn’t quite meet the Army requirements, and the doctor says, ‘Well, we will pass him anyway because he will refuse to be inducted and they will send him to prison for committing a felony.’ There is too much that is incongruous about that. It is too much like the Communists themselves would do, if you please, in the language of the street, to set a man up to convict him of a felony.” (Reporter’s Transcript in #25778-WM, page 3, lines 19 through 25).

In response to the government’s argument that the irregularity had not damaged that defendant, Judge Mathes said:

“Well, it is akin to unlawful entrapment. Morally it is akin to unlawful entrapment as I view it. You are going to force a man into a position where you know he is going to commit a felony; whereas if you let him go the other way, he wouldn’t.” (Reporter’s Transcript in #25778-WM, page 4, lines 10 to 16).

A defendant in a draft refusal case must show that he has exhausted all of his administrative remedies or he may not mount an attack on his classification as a defense in court, *United States v. Falbo*, 1944, 320 U.S. 549, 64 S. Ct. 346. He is required to exhaust his administrative remedies so that the courts will not be burdened with trials that

might have been avoided by the defendant's success at some stage of the administrative process which would preclude his being ordered to submit to induction. The courts have been rather rigid on this exhaustion point, requiring that the defendant go to the brink of induction, that he complete every step of the process prior to refusing to actually enter the military, *Estep v. United States*, 1946, 327 U.S. 114, 66 S. Ct. 423.

All of the arguments that support the requirement that the defendant exhaust the administrative process apply with equal vigor to the government. Shortcuts to induction taken by the government burden the courts with cases that could have been avoided altogether, to say nothing about the inconvenience and expense to the young men involved.

For this reason, as well as for the reason that deprivation of a chance to avoid the dilemma is grossly unfair to the appellant, the government should be required to exhaust the administrative opportunities for rejection that the regulations provide before forcing the registrant to induction, refusal and trial.

### CONCLUSION

For the reasons cited above, the judgment of the District Court should be reversed and an order entered directing the District Court to enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ AND

MICHAEL HANNON

*Attorneys for Appellant*

February 1, 1967



I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

**J. B. TIETZ AND**

**MICHAEL HANNON**

410 Douglas Building

257 South Spring Street

Los Angeles, California 90012

*Attorneys for Appellant*



NO. 21082

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID MACHADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

WILLIAM P. LAMB,  
Assistant U. S. Attorney,

808 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

Attorneys for Appellee,  
United States of America.

**FILED**

MAY 1 1967

WM. B. LUCK, CLERK

MAY 1 1967





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID MACHADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

WILLIAM P. LAMB,  
Assistant U. S. Attorney,

808 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATUTES INVOLVED	2
III STATEMENT OF FACTS	5
IV QUESTIONS RAISED ON APPEAL	7
V ARGUMENT	8
A. THE FINDING OF INSINCERITY CON- STITUTES A BASIS IN FACT FOR REJECT- INT APPELLANT'S CONSCIENTIOUS OBJECTOR CLAIM.	8
B. APPELLANT WAS ACCORDED A FAIR ADMINISTRATIVE HEARING.	14
C. CONTENTIONS NOT RAISED DURING TRIAL SHOULD NOT BE REVIEWED ON APPEAL.	15
VI CONCLUSION	19
CERTIFICATE	20
APPENDIX "A"	
EXCERPT FROM TRANSCRIPT OF <u>UNITED</u> <u>STATES</u> v. <u>FEUER</u> ,	A-1





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Annett v. United States, 205 F.2d 689 (10th Cir. 1953)	12
Campbell v. United States, 221 F.2d 454 (4th Cir. 1955)	13
Cox v. United States, 332 U.S. 442 (1947)	13
Dickinson v. United States, 346 U.S. 389 (1953)	9, 13
Elder v. United States, 202 F.2d 465 (9th Cir. 1953)	16
Estep v. United States, 327 U.S. 114 (1956)	13
Grant v. United States, 291 F.2d 746 (9th Cir. 1961), cert. den. 368 U.S. 999	17
Johnson v. United States, 285 F.2d 700 (9th Cir. 1960)	18
Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961)	17
Robbins v. United States, 345 F.2d 930 (9th Cir. 1965)	17
Rogers v. United States, 263 F.2d 283 (9th Cir. 1959)	14
Tyree v. United States, 351 F.2d 611 (5th Cir. 1965), cert. den. 385 U.S. 871	17
Uffelman v. United States, 230 F.2d 297 (9th Cir. 1956)	15
United States v. Corliss, 280 F.2d 808 (2nd Cir. 1960)	10, 11, 12
United States v. Feuer, Unreported (9th Cir.)	16, 18, A-1



	<u>Page</u>
United States v. Lawson, 337 F.2d 800 (3rd Cir. 1964), cert. den. 380 U.S. 919	18
United States v. Manns, 232 F.2d 709 (7th Cir. 1956)	18
United States v. Miller, 316 F.2d 81 (8th Cir. 1963), cert. den. 375 U.S. 935	17
United States v. Seeger, 380 U.S. 163 (1965)	8, 9
Witmer v. United States, 348 U.S. 375 (1955)	9, 10, 11, 13

#### Statutes

Title 18, United States Code, §3231	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2
Title 50 Appendix, United States Code, §456(j)	3, 6, 8
Title 50 Appendix, United States Code, §462	1, 2
Title 50 Appendix, United States Code, §462(a)	2
Title I, Universal Military Training and Service Act, §6(j)	8

#### Regulations

##### Title 32, Code of Federal Regulations:

§1624.1(b)	15
§1631.7	3
§1631.7(a)	6, 13
§1631.7(a)(3)	6, 13
§1641.7	18





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DAVID MACHADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

Appellant David Machado was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on April 6, 1966, in Case No. 36029-CD [C. T. 2]. <sup>1/</sup> The indictment charged a violation of Title 50 Appendix, United States Code §462, Universal Military Training and Service Act; Refusal to be inducted.

On May 23, 1966, appellant was arraigned and entered a plea of not guilty. He was represented by retained counsel at all stages of the proceedings. On June 7, 1966, the case was called for court trial before the Honorable Irving Hill, United States

---

<sup>1/</sup> "C. T. " refers to Clerk's Transcript of Record.



District Judge. Trial commenced and appellant was found guilty on June 8, 1966. On June 28, 1966, appellant was sentenced to the custody of the United States Attorney General for a term of three years [C. T. 6]. Bond on appeal was set at \$100.

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, §462 and Title 18, United States Code, §3231. This Court has jurisdiction pursuant to Title 28, United States Code, §1291, §1294.

## II

### STATUTES INVOLVED

Title 50 Appendix, United States Code, §462(a) provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . , or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . , or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment





for not more than five years or a fine of not more than \$10,000, or by both. . . ."

Title 50 Appendix, United States Code §456(j) provides in pertinent part as follows:

" . . . Any person claiming exemption from combatant training and service because of . . . conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. . . ."

### Regulations

Title 32, Code of Federal Regulations §1631.7 provides in pertinent part as follows:

"(a) Each local board, upon receiving a Notice of



Call on Local Board . . . for a specified number of men to be delivered for induction . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A . . . and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction. . . . Such registrants . . . shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship





in their homes, in the order of their dates of birth with the oldest being selected first. . . ."

### III

#### STATEMENT OF FACTS

On October 14, 1958, at age 18, appellant registered with his local board (Ex. 2). <sup>2/</sup> On April 19, 1960, the local board received notice that appellant had moved to New York but planned to return to his old address in Los Angeles at the end of the year (Ex. 16). On December 14, 1960, however, appellant wrote the local board that he had left New York and was "touring Europe" stating that he could be "reached through [his] parents" at a given address (Ex. 17).

In October, 1961, appellant was sent a Classification Questionnaire at his parent's address, but this questionnaire was never completed and returned as required (Ex. 19-28). On November 9, 1961, appellant was classified as I-A, and on November 13, 1961, notice of said classification was mailed to him at the address on file with the local board. On April 11, 1963, the local board again mailed appellant a Classification Questionnaire, which was this time completed and returned (Ex. 4). No claim for exemption as a conscientious objector was asserted (Ex. 7).

---

<sup>2/</sup> "Ex" refers to Appellant's Selective Service File.



On April 18, 1963, appellant was ordered to report for his armed forces physical examination on May 3, 1963 (Ex. 33). Thereafter on October 15, 1963, the local board received notice that, after examination, appellant had been found fully acceptable for induction into the armed forces, and appellant was notified of this fact (Ex. 12, 38). On October 24, 1963, the local board received notice that the appellant was no longer a full-time student (Ex. 42). Consequently, on November 14, 1963, appellant was classified as I-A. Normally, the next step in his selective service processing would be an order to report for induction. Cf. 32 C.F.R. §1631.7(a), (a)(3). Within two weeks after the notice of the I-A classification had been mailed, however, appellant asserted "convictions against killing my fellow man" and was sent a Form 150, the Special Form for Conscientious Objector (Ex. 43). Appellant indicated that his conscientious objections to war had developed during childhood and been reinforced "during experiences abroad" (in late 1960 and 1961) (Ex. 17, 46). He stated in his Form 150 that he had not given public expression to his conscientious objector views (Ex. 46). At some time in the fall of 1963, however, he gave a speech entitled "Thou Shalt Not Kill" as part of a class in Basic Public Speaking at Los Angeles City College (Ex. 85).

Appellant was again classified I-A by the local board (Ex. 12), and was accorded the special appellate procedures required by Title 50 App. U.S.C. §456(j), i. e., an inquiry and hearing by the Department of Justice prior to action by the local appeal board on his claimed exemption (Ex. 72). The hearing officer of the Department





of Justice found that the appellant was not sincere (Ex. 73). The Department of Justice also concluded that appellant was insincere and recommended against granting a conscientious objector exemption (Ex. 75). The appeal board concurred in this recommendation, classifying the appellant as I-A on November 1, 1965 (Ex. 14). Notice of said classification was mailed to the petitioner on November 19, 1965 (Ex. 14). Thereafter, on December 7, 1965, appellant was ordered to report for induction on December 21, 1965 (Ex. 14). Appellant appeared on that day but did not submit to induction (Ex. 112-114).

#### IV

#### QUESTIONS RAISED ON APPEAL

I. Was there a basis in fact for denying appellant a conscientious objector exemption?

II. Was appellant accorded due process during his hearing before the hearing officer of the Department of Justice?

III. Should this Court review contentions not raised in the District Court?



ARGUMENT

A. THE FINDING OF INSINCERITY  
CONSTITUTES A BASIS IN FACT  
FOR REJECTING APPELLANT'S  
CONSCIENTIOUS OBJECTOR  
CLAIM.

---

Section 6(j) of Title I, Universal Military Training and Service Act, as amended, 50 App. U.S.C., §456(j) provides that a registrant denied classification as a conscientious objector by his local board, is entitled to a hearing and inquiry by the Department of Justice which then makes an advisory recommendation to the appeal board prior to a ruling on the registrant's claim for exemption. See supra, page 3.

Appellant was accorded such an inquiry and hearing pursuant to the above provision. The hearing officer found him not sincere (Ex. 73). The registrant never contradicted the summary of the Department of Justice inquiry (Ex. 73, 76-83). The Department of Justice recommended that the registrant's conscientious objector claim be not sustained on the sole ground that the registrant was not sincere in that claim, on the basis of its inquiry, the hearing and the facts appearing in appellant's Selective Service File. 3/

---

3/ This case, therefore, differs from that of the registrant Jacobson. See United States v. Seeger, 380 U.S. 163, 168 (1965) (Consolidated Opinion). There, the recommendation of the Department of Justice regarding Jacobson was based both on insincerity and the absence of an appropriate belief in relation to a Supreme Being. There is no suggestion in the present record, we submit, that the appeal board may have relied upon an improper standard in rejecting the appellant's conscientious objector claim.





Witmer v. United States, 348 U.S. 375 (1955), establishes that insincerity is a ground for denying a conscientious objector exemption and that a finding of insincerity can be based on "any fact which casts doubt on the veracity of the registrant". <sup>4/</sup> 348 U.S. at pp. 381-382. The question is whether the registrant's beliefs are "truly held". See United States v. Seeger, 380 U.S. 163, 185 (1965).

In the instant case, the finding of insincerity was supported by:

1. The appellant's demeanor and credibility (Ex. 73);
2. The imminence of induction at the time the claim was asserted (Ex. 74);
3. The lack of public expression supporting appellant's views (Ex. 46, 74);
4. Appellant's delay in asserting the claim (Ex. 74);

To this can be added:

5. The fact that appellant asserted the claim immediately after losing his status as a student for deferment purposes, and that

---

<sup>4/</sup> The Supreme Court distinguished Dickinson v. United States, 346 U.S. 389 (1953), stating that, in the case of a conscientious objector claim, "the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form". 348 U.S., at p. 381. Conscientious objector status is, therefore, properly denied where the record is susceptible of some inference of insincerity. In Dickinson, the registrant had presented undisputed, objective facts showing, prima facie, that he was a "regular or duly ordained minister of religion". The local board was therefore required to rebut these objective facts with some evidence "incompatible with the registrant's proof of exemption". 346 U.S., at p. 396.



he continued to consider seeking student deferment (Ex. 42, 58) [R. T. 109]. <sup>5/</sup>

6. The fact that appellant failed to assert the claim on filing his Classification Questionnaire in April 1963, when the issue was raised in Part VIII of the form, although this was only six months prior to the time the claim was asserted (Ex. 4, 7).

In Witmer, the hearing officer found the registrant sincere, contrary to the appeal board. Even without a finding of insincerity based on demeanor, the Supreme Court held that there were "indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity". 348 U. S. , at p. 383. The Supreme Court stressed that the petitioner failed "to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war". 348 U. S. , at p. 383. It was also noted that insincerity could be inferred from the fact that the claim was only advanced after other requests for deferment had been denied, and also from inconsistent statements of the registrant.

Additional factors supporting a finding of insincerity are stressed in United States v. Corliss, 280 F.2d 808 (2nd Cir. 1960). This consolidated opinion affirmed the conviction of Fred August Heise, the Court noting that Heise's initial registration questionnaire did not set forth a conscientious objector claim. <sup>6/</sup> The

---

<sup>5/</sup> "R. T." refers to Reporter's Transcript.

<sup>6/</sup> Further, as in Witmer, the registrant sought deferment on other grounds, and had failed to express his views publicly.





Court also relied upon the fact that the "hearing officer 'was not favorably impressed as to the registrant's sincerity in making his claim' ". Thus, unlike in Witmer, an assessment of the registrant's credibility served to support a finding of insincerity.

In affirming the conviction of the registrant Corliss, the Court also stressed the hearing officer's finding of insincerity based upon his observation of the registrant's demeanor. Citing Witmer, supra, in recognition of the fact that the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting on religious grounds to participation in war in any form, the Court held that:

"It would seem to follow that although denial of exemption may be and often is supported by objective facts inconsistent with the claim, denial may also rest on a disbelief in the sincerity of the claim, unaccompanied by any inconsistent facts, provided the disbelief is honest and rational."

(Emphasis added. ) 280 F.2d at p. 814.

In Corliss' case, the court affirmed his conviction even though Corliss was associated with a religious sect having as one of its tenets opposition to war in any form; although Corliss' association with this religious sect long preceded his liability for military service; and although there was no evidence of conduct inconsistent with his claim of sympathy with that sect. In the instant case, we submit that there is more to support an inference of insincerity than the bare finding based on demeanor in the registrant Corliss'



case.

We submit that Annett v. United States, 205 F.2d 689 (10th Cir. 1953), cited in Appellant's Opening Brief, p. 12, is not in conflict with Corliss, supra. The language quoted in appellant's brief, p. 12, indicates only that insincerity can not be based upon the opinion or conclusion of a witness. This is different from a finding of insincerity made by a judicial officer based on demeanor evidence. In Annett, a finding of insincerity by the hearing officer was in fact reversed, but it was not based on a credibility finding supported by personal observation. We submit that the finding of insincerity in Annett would not stand up under the test required in Corliss, supra, i. e. that the finding be honest and rational, because it was biased and arbitrary on its face, and because it relied on improper opinion evidence.

We submit conversely that the finding of insincerity in the instant case does stand up under the Corliss test. There is nothing in the present record to indicate that the finding of the Hearing Officer was dishonest, improperly motivated, or irrational.

There are also incongruities in the registrant's statements and conduct which cast doubt upon his sincerity. The registrant stated that he was trained in the basis for his beliefs by his parents from earliest childhood, and that his experiences abroad had reinforced them (Ex. 46). Yet the registrant told the hearing officer that he began to think about his values and attitudes at the age of 19, associating the event with the arrival of his first draft notice (Ex. 73).





Whenever his ideas began to form, it was still not until the fall of 1963 that registrant chose to assert that he could not take part in war (Ex. 45). This was so even though the experiences abroad which had ostensibly reinforced his beliefs had taken place in 1960 and 1961 (Ex. 17, 46). When the claim was asserted his induction was imminent. Under these circumstances, the appeal board was not bound to credit his beliefs. Campbell v. United States, 221 F.2d 454 (4th Cir. 1955). <sup>7/</sup>

Under all these circumstances, we submit that enough of an inference of insincerity arises to provide a basis in fact for denying a conscientious objector exemption, and for classifying appellants as I-A (available for military service). Courts have uniformly refused to interfere with a registrant's classification as I-A unless it was first found that the local board lacked a basis in fact for the classification or that the local board acted arbitrarily and capriciously to the degree that the registrant was denied due process.

Witmer v. United States, supra;

Dickinson v. United States, supra;

Estep v. United States, 327 U.S. 114, 122 (1956);

Cox v. United States, 332 U.S. 442, 448 (1947);

---

<sup>7/</sup> When appellant asserted his claim, he had been found physically acceptable for service (Ex. 12, 38); he had been classified as I-A (Ex. 12); and he had just lost his qualification for a student deferment (Ex. 42). We submit that at his then age of 23, his induction must be, and must have been, considered as imminent. Cf. 32 CFR §1631.7(a), (a)(3).



(9th Cir. 1959).

We submit that the present record does not support such a finding of arbitrariness or lack of basis in fact.

B. APPELLANT WAS ACCORDED A  
FAIR ADMINISTRATIVE HEARING.

---

During the processing of the appellant's conscientious objector claim by the Selective Service System, he was given a hearing before a hearing officer of the Department of Justice, referred to in Argument A, supra. Appellant appeared at the hearing with two persons, his father and a Richard Brooks [R. T. 49]. His father was present with him during the interview with the Hearing Officer [R. T. 51], and was allowed to speak on his behalf [R. T. 52-53]. Appellant made no request that Richard Brooks make any statement [R. T. 60-61].

The Hearing Officer testified at the trial that in the approximately 50 instances in which he had acted as a hearing examiner in such cases, it was never his policy to limit the number of witnesses who might appear on behalf of a Selective Service registrant, explaining that he only restricted to one the number of witnesses who might accompany the registrant in the hearing room at one time [R. T. 82, 84]. The trial court specifically credited this testimony, finding as a fact that the persons accompanying appellant were told that only one witness at a time was permitted



in the hearing room, not that only one witness was permitted to testify on behalf of the appellant [R. T. 132].

In any case, the refusal of the hearing officer to hear a proffered witness, would not be a violation of the registrant's constitutional or statutory rights according to Uffelman v. United States, 230 F.2d 297, 303 (9th Cir. 1956). See 32 C.F.R. §1624.1(b).

C. CONTENTIONS NOT RAISED DURING  
TRIAL SHOULD NOT BE REVIEWED  
ON APPEAL.

---

Appellant was ordered to report for induction on December 21, 1951. He reported but refused to submit to induction (Ex. 112-114). No testimony was offered at trial regarding what took place at the induction station, and no issue was raised by the appellant during trial regarding any action taken there which allegedly deprived him of due process.

The Selective Service file contains several documents relating to appellant's induction processing (Ex. 115-146). These documents include an Armed Forces Security Questionnaire, DD Form 98, executed by the appellant on May 3, 1963. This document bears a stamp with signature blanks to be executed to verify that the registrant has reviewed the contents of this form at the time of induction (Ex. 141). The blanks in this stamp are not filled in. Since appellant did not contend at trial that he was deprived of an opportunity to review the questionnaire, we have no way of





establishing the surrounding facts, including for example, the specific opportunity to execute the form, and deliberate waiver. Furthermore, appellant does not claim that he was prejudiced by the absence of a re-executed DD Form 98 in his file. Cf. United States v. Feuer. <sup>8/</sup>

Appellant was represented by competent counsel at trial. He should not be allowed to raise for the first time on appeal an abstract issue which cannot fully be analyzed in terms of the Selective Service File. In Elder v. United States, 202 F.2d 465 (9th Cir. 1953), a Selective Service case, this Court approved the general rule that contentions not raised in the District Court will not be considered on appeal, making an exception only because the same contention, properly raised, had been upheld by another Circuit. The facts of record, however, clearly supported the contention raised for the first time on appeal in Elder, supra. There the appellant claimed prejudice from the fact that an F. B. I. report regarding his belief as a conscientious objector was not placed in his Selective Service File. We submit that in the instant case, there is no reason to depart from the general rule stated in Elder. Here, the appellant cites no reported case which has upheld his contention. Furthermore, all the facts bearing on the issue now raised were not developed at trial.

The same argument applies to the appellant's claim that

---

<sup>8/</sup> This unreported case is cited in appellant's brief at p. 25 and a part of the court's remarks are quoted. The existing partial transcript of the court's remarks was provided to appellee by the court reporter, and these remarks are set forth in Appendix "A".



he was not physically re-examined on the day he reported for induction. The Selective Service File indicates that forms for appellant's physical re-examination were available at the induction station. These, however, were not filled out. Instead the words "refused induction" appear on one page (Ex. 116). Again the reason why these forms were left blank does not clearly appear from the file. If the appellant is allowed to raise this issue for the first time on appeal, he deprives the appellee of chance to explain why these documents were left blank and to establish any waiver.

Since neither contention was raised at trial, neither should be reviewed on appeal. Robbins v. United States, 345 F.2d 930 (9th Cir. 1965). This Court, as it held in Robbins, is entitled to full development of relevant facts at the trial, and findings of the District Court on any disputed facts, before being called upon to review questions on appeal.

See also:

United States v. Miller, 316 F.2d 81, 83

(8th Cir. 1963), cert. den. 375 U.S. 935;

Tyree v. United States, 351 F.2d 611-612

(5th Cir. 1965), cert. den. 385 U.S. 871;

Cf. Ramirez v. United States, 294 F.2d 277, 283

(9th Cir. 1961);

Grant v. United States, 291 F.2d 746, 748

(9th Cir. 1961), cert. den. 368 U.S. 999.

In any case, the Court we submit should require some showing in the record of prejudice, or, at least the strong





suggestion of prejudice, before allowing appellant to prevail on what we submit are technical procedural objections.

Cf. United States v. Lawson, 337 F.2d 800, 812  
(3rd Cir. 1964), cert. den. 380 U.S. 919;  
United States v. Manns, 232 F.2d 709  
(7th Cir. 1956).

This is especially so with respect to appellant's claim that he was not physically re-examined as required, since a duty is placed upon a prospective inductee to inform the local board of any change in his physical condition which occurs after his last examination. See Johnson v. United States, 285 F.2d 700, 702 (9th Cir. 1960). This is specifically required of the registrant by 32 C.F.R. §1641.7. Prior physical examinations in 1963 and 1964 found him fit (Ex. 124, 126). There is nothing akin to entrapment, i. e. suggesting that Army physicians believed him unfit and decided to pass him anyway. Cf. Feuer, supra.

On the entire record, we submit there is no showing that petitioner has suffered treatment amounting to a deprivation of due process.



CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

WILLIAM P. LAMB,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William P. Lamb

WILLIAM P. LAMB









APPENDIX "A"

LOS ANGELES, CALIFORNIA; FRIDAY, MAY 24, 1957;

1:30 O'CLOCK P. M.

- - -

\* \* \* \* \*

THE COURT: I have given a great deal of thought to this, Mr. Duncan, over the recess.

In view of the material appearing at page 124 and page 130 of the Selective Service file which indicates that some people thought of this defendant as being at least pro-Communist in his leanings, it looks to me as if someone may have just skipped the Loyalty Certificate. I don't know for what reason. It could be in view of this defendant's prior record that they didn't want to give him an opportunity to take it for fear he might not qualify. If he couldn't qualify he couldn't commit the felony with which he is here charged. And they knew he would refuse because he previously refused to report for induction.

MR. DUNCAN: The law doesn't require a vain act, your Honor.

THE COURT: Well, it seems to me that the Army should be required to show a waiver. Of course, I may be straining to make a legal proposition out of what is really an ethical one, but I would never permit a conviction against this defendant to stand in the face of this record.

The Army would have to swallow its regulation or comply





with it. They can't have their cake and eat it, too. They get caught in their own entanglement of the regulations. They won't take a man who is a Communist or who belongs to certain organizations even to do the menial work of the Army. They won't take people with criminal records to do the menial work of the Army. So it is fast becoming set up to the point where only the people who have unblemished records, the flower of the youth, so to speak, can have the "privilege" of doing the menial work of a buck private in the Army.

And while I don't depreciate the fact that people should look upon the privilege of serving the country as a privilege, I don't think that is the popular notion of this Selective Service Act today in peacetime.

It seems to me that if the Army wants to convict this man they can give him another notice to report for induction; if they either get this regulation out of the way somehow or certify he complies, or give him a chance to comply -- give him a chance to flunk it, so to speak.

This is almost like unto -- ethically at least -- a registrant with his record who has a vision that just doesn't quite meet the Army requirements, and the doctor says, "Well, we will pass him anyhow because he will refuse to be inducted and they will send him to prison for committing a felony." There is too much that is incongruous about that. It is too much like the Communists themselves would do, if you please, in the language of the street, to set a man up to convict him of a felony.



MR. DUNCAN: Your Honor, there was no evidence offered whatsoever that the Loyalty Oath or the waiver actually had anything to do with his refusal to be inducted.

THE COURT: No. Why didn't they give it to him then? The regulations say that every man shall have it. Why didn't they give him a chance to flunk it?

If he had failed the loyalty test then he couldn't have committed this felony, could he?

MR. DUNCAN: How has the irregularity damaged him in any way?

THE COURT: Well, it is akin to unlawful entrapment. Morally it is akin to unlawful entrapment, as I view it. You are going to force a man into a position where you know he is going to commit a felony; whereas if you let him go this other way he wouldn't.

MR. DUNCAN: I don't see how it is akin to entrapment at all, your Honor.

THE COURT: Well, I said "morally." I didn't say "legally," here.

MR. DUNCAN: Here are two procedural requirements. Nobody would argue that they were non-existent. No such regulations exist that the defendant had been denied any right. So I fail to see how the mere irregular performance or failure to perform those regulatory requirements can constitute a denial of due process as far as he is concerned.

THE COURT: Well, Mr. Duncan, if what appears in this



file didn't appear in this file it might appear differently to me. But I see the undertone here, or the overtone whichever you wish to characterize it, the thought that this man is a Communist; that he cannot pass that loyalty test. And if he didn't pass it he couldn't have committed the felony with which he is charged here, could he? He couldn't have committed it, could he?

MR. DUNCAN: Your Honor, the people at the induction station didn't have access to this Selective Service file.

THE COURT: I don't know who knew what, but what I am saying is that I would not permit a conviction of this man to stand on this kind of a record. I wouldn't be a party to it.

It may be all coincidence. I am not suggesting that it is anything but coincidence. But even on coincidence -- the cruelest pain that a human being can suffer is a pain of injustice, and to be forced by prior knowledge into committing a felony is something we shouldn't tolerate. To be forced, by removing one of the cogs of the administrative machinery, if you please, to appear that that might stop him from committing the felony. I am not suggesting it was done premeditatively, but on the record it is susceptible of that interpretation. And this man has been in the books. I read the case this morning. In fact, you cited it to me the other day in another case. The Foyer[sic] case. I didn't connect the two but you cited it to me on that Selective Service case on this question of change of classification. I didn't recognize it at the time. I didn't connect it with this defendant.

So he is well known in Selective Service circles, I can see





that, in this community. This file indicates that. He has been sent to prison once, and he may go again. I have no hesitancy in sending a registrant who refuses to obey the law to prison. I send them to prison all the time; too many of them, unfortunately.

But if the Army is going to have regulations like this they should either apply it to this man or put in the record why they don't before I would be a party to convicting him of a felony under these circumstances.

So I shall hold that there is no evidence that the regulation was waived; that the regulation, according to Army's own statement, is a condition precedent to qualification for induction.

MR. DUNCAN: Which regulation are you referring to, your Honor?

THE COURT: I am referring to the Loyalty Certificate regulation, DD Form 98, Section 5, page 60, Regulation No. 31, especially paragraphs (d) and (g).

I will ask the reporter to copy those into the record at this point. Will you make it available to him so that he may copy it into the record?

MR. DUNCAN: I might point out, your Honor, that this regulation is not exactly applicable as to the time of this offense. I will stipulate that there was essentially the same regulation in effect at this time.

THE COURT: Will you so stipulate, Mr. Marshall?

MR. MARSHALL: Yes, your Honor.

(31(d). One Loyalty Certificate is required of each



individual, except registrants classified as 1-0 (Conscientious Objectors available for civilian work contributing to the maintenance of the national health, safety or interest) who are exempt from the requirement to accomplish the Loyalty Certificate.

(g) A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (re paragraph 2(i) and (j), AR604-10) or who discloses significant derogatory information with respect to his background, or invokes constitutional privileges, and registrants admitting current membership in the Communist Party (known Communists) and registrants for whom credible derogatory information has been received from a reliable source indicating Communist Party membership) (alleged Communists) as defined in Paragraph 2(e) and (f) AR604-10, will not be inducted into the Armed Forces pending completion of a thorough investigation.)

MR. DUNCAN: Then, your Honor, you feel that both regulations as to the Loyalty Certificate, as well as the Civil Defense waiver are --

THE COURT: Well, the Civil Defense waiver, I don't have that regulation before me. What does it provide?

MR. DUNCAN: It is a provision, your Honor, that the Army must waive the prior civil offense of the registrant prior to induction. I thought that was in the regulation that I gave your Honor.

THE COURT: It may have been. But I didn't get past this other one.





MR. MARSHALL: You didn't need to get past it.

THE COURT: You see, it is easier to find a waiver of that because that requires an affirmative act to stop the man, doesn't it? It requires affirmative acts of the Army to stop him.

But here this regulation with respect to the Loyalty Certificate requires an affirmative act of the registrant himself. It's like passing the examination. It's a test. They call it a test, a loyalty test. He has to pass that in order to be eligible.

And this record is susceptible to the interpretation that someone said, "He can't pass it. He won't pass it. So he won't be eligible for induction, so he won't commit the offense. He will refuse to be inducted, in any event, so let's offer it to him and let him refuse and let him be convicted again."

I want to make it clear that I am not suggesting that that is what in fact happened. But when the record is susceptible of that interpretation, it seems to me highly unjust and highly immoral to base a conviction upon such a record.

If there is nothing further, gentlemen, we will summon the jury and I will vacate the order denying the motion for a judgment of acquittal and grant a judgment of acquittal.

I should think in all of these cases you would be prepared to prove the waiver. The waiver should show in the file. Of course, if it is in the registrant's file that makes it easy to prove.

MR. DUNCAN: Well, as your Honor knows, this is a point of first impression. It hasn't been litigated before to my knowledge.



THE COURT: It is all new to me. I didn't know there was such a regulation. I knew there was a regulation with respect to civil offenses, but I never knew there was a regulation requiring a man to pass a loyalty test to be inducted into the Army.

\* \* \* \* \*

.



---

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 21082**

---

DAVID MACHADO,  
*Appellant,*

VS.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**APPELLANT'S CLOSING BRIEF**

---

J. B. TIETZ AND  
MICHAEL HANNON

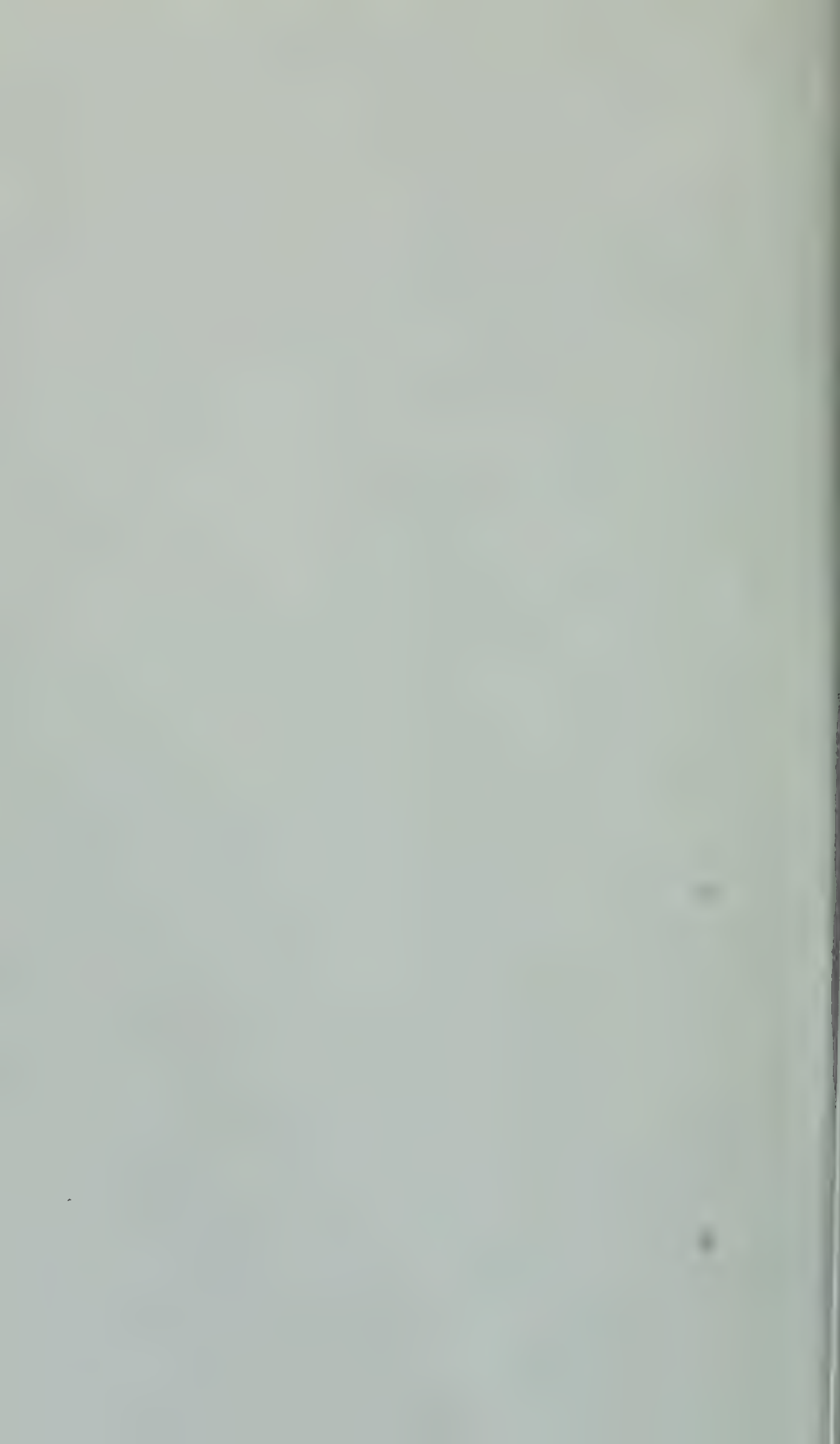
410 Douglas Building  
257 South Spring Street

**FILED** Los Angeles, California 90012  
*Attorneys for Appellant*

MAY 19 1967

261967





## INDEX

I. The No Basis in Fact Point .....	1
II. Appellant Was Denied Due Process by the Manner in Which the Hearing Officer's Hearing Was Con- ducted Which Deprived Him of the Opportunity to Have Both His Witnesses Speak .....	11
III. Appellant's Due Process Points Were Raised Dur- ing Trial and Should Be Considered on Appeal .....	15
Certification .....	20
Appendix A—Addendum No. I to Instructions to Spe- cial Hearing Officer for the Department of Justice in Conscientious-Objector Matters .....	21

### TABLE OF CASES

<i>Annett v. United States</i> , (10 Cir., 1953) 205 F.2d 689 .....	9, 10, 11
<i>Chernekoff v. United States</i> , (9th Cir., 1955) 219 F.2d 721 .....	18
<i>Daniels v. United States</i> , (9th Cir., 1967) 372 F.2d 407 ....	19
<i>Elder v. United States</i> , (9th Cir., 1953) 202 F.2d 465 .....	16
<i>Grant v. United States</i> , (9th Cir., 1961) 291 F.2d 746 ....	18
<i>Uffelman v. United States</i> , (9th Cir., 1956) 230 F.2d 297 .....	11, 12, 13, 14
<i>United States v. Corliss</i> , (2nd Cir., 1960) 280 F.2d 808 .. .....	6, 7, 8, 9
<i>United States v. Gearey</i> , (2nd Cir., 1966) 368 F.2d 144 ..	3, 4
<i>United States v. Glessing</i> , (U.S.D.C. Minn., 1951) No. 8173 .....	12
<i>United States v. Miller</i> , (8th Cir., 1963) 316 F.2d 81 .....	18
<i>United States v. Walter Kobil</i> , (U.S.D.C. E.D. Mich., 1951) No. 32,390 .....	13
<i>Ramiriz v. United States</i> , (9th Cir., 1951) 294 F.2d 277 ..	17

<i>Robbins v. United States</i> , (9th Cir., 1965) 345 F.2d 930	17
<i>Tyree v. United States</i> , (5th Cir., 1965) 351 F.2d 611 ....	18
<i>Witmer v. United States</i> , (1955) 348 U.S. 375 .....	6, 7, 8, 9

RULES AND REGULATIONS

32 C.F.R., Part 1624 .....	14
32 C.F.R. 1623.2 .....	5
Federal Rule of Criminal Procedure 30 .....	17

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 21082**

---

DAVID MACHADO,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**APPELLANT'S CLOSING BRIEF**

**I**

**THE NO BASIS IN FACT POINT**

Appellant's Reply Brief states that the Summary of the Department of Justice inquiry discloses six facts which support the Hearing Officer's statement that appellant was insincere (ARB 9)<sup>1</sup> and adds two "incongruities" in appellant's statements which allegedly cast doubt upon his sincerity [ARB 12].

---

1. ARB refers to Appellant's Reply Brief.

Also the appellee asserts, "The registrant never contradicted the summary of the Department of Justice inquiry [Ex. 73, 76-83]" [ARB 8]. We invite the court's attention to the nine page, typewritten reply to the said summary, found in the Exhibit on pages 88 et sequentia, signed by both appellant and his then attorney, Mr. Daniel Marshall.

Appellant submits that none of the asserted supporting facts actually support the inference of insincerity that appellee would have us draw from them. We will examine each:

"(1) The appellant's demeanor and credibility [Ex. 73];"

Neither the word "demeanor" nor any reference whatsoever to appellant's appearance or attitude appears on Ex. 73 or any place else in the Department of Justice summary. The insinuation that there was something wrong with appellant's demeanor, from which a negative inference might be raised, was imported into the case for the first time by appellee's brief.

Appellant concedes that the statement that the "Hearing Officer concluded that the registrant is not sincere" does appear at Ex. 73. Appellant quoted the same statement in his Opening Brief on Appeal (at page 15). This statement is the very statement that appellant complains is totally unsupported by the facts in the record. Appellee proves nothing by citing that naked conclusion.

"(2) The imminence of induction at the time the claim was asserted [Ex. 74];"

"(4) Appellant's delay in asserting his claim [Ex. 74];"

"(6) The fact that appellant failed to assert the claim on filing his Classification Questionnaire in April, 1963, when the issue was raised on Part VIII of



the form, although this was only six months prior to the time when the claim was asserted [Ex. 4, 7].”

These three points each restate in slightly altered language the same basic complaint: appellant did not fully develop his beliefs in early childhood—instead they were the result of a long process of evaluation which finally matured in a firm commitment to conscientious objection as the approach of induction forced appellant to make a decision.

In 1940, the Congress, upon reenacting conscription, abandoned the former [1917] requirement that a conscientious objector belong to one of the historic peace churches. The Congress thereby recognized that conscientious objection to war in any form is not necessarily learned at one’s mother’s knee. No time requirement was made in the 1940 act nor in the subsequent Act under which this prosecution is brought.

The Second Circuit recognized that the learning process by which a genuine conscientious objector arrives at his beliefs may be a process of maturation and crystallization. In *United States v. Gearey*, (2nd Cir., 1966) 368 F.2d 144, 150, the Court said:

“It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until he received his notice<sup>10</sup> (Footnote 10: The Defense Department has recognized that a genuine claim of conscientious objection may arise even after induction. . . .) although the belatedness of the claim may be a factor in assessing its genuineness. The realization that induction is pending and that he may soon be asked to take another man’s life may cause a young man finally to crystallize and articulate his once vague sentiments.”

Although it may be a factor to be considered when the registrant has waited until after the Order to Report for Induction has been issued, as in *Gearey* (that is not the case with appellant), even then it is only a factor. As the Second Circuit has stated, it would be improper to draw a conclusion against appellant merely on that ground.

“(3) The lack of public expression supporting appellant’s views [Ex. 46, 74];”

This not entirely accurate statement of the facts reflects only another aspect of the situation discussed immediately above. It would be entirely unreasonable to expect numerous public expressions of a belief not yet formulated. There was no “lack” of such expressions in appellant’s past but rather a history of a few such statements at scattered times. A letter submitted to the local board by David A. V. Moody, an instructor at Los Angeles City College and one of appellant’s teachers, states that appellant had given a speech in his class on conscientious objection, entitled “Thou Shalt Not Kill” [Ex. 86]. The letter of another instructor [Ex. 85] and several of the statements made to the F. B. I. by various informants and summarized by the Department of Justice [Ex. 76-83] show that appellant was concerned with the subject and had spoken of it in private conversations. In the light of the rest of the facts showing that appellant’s beliefs had matured over a period of time, an inference of insincerity drawn from the relative infrequency of such statements is an entirely unwarranted logical leap.

“(5) The fact that appellant asserted the claim immediately after losing his status as a student for deferment purposes, and that he continued to consider seeking student deferment [Ex. 42, 58] [R. T. 109].”

As a basis for drawing an inference about appellant's sincerity, these facts are utterly worthless. The Selective Service Regulations (32 Code of Federal Regulations, hereinafter referred to as "The Regulations") state in Section 1623.2 that a registrant is entitled to the lowest classification for which his circumstances qualify him. The order of classifications from highest to lowest is set forth therein with Class I-A being the highest, followed by Class I-A-O and Class I-O (the conscientious objector classifications). Class II-S, the student's deferment, is a lower classification than either of those for conscientious objectors. It is entirely reasonable and logical that a conscientious objector who is also a student would prefer Class II-S since the objector is called and ordered to perform his alternative service at the time when he would normally be called for induction. The II-S classification would defer that call until the completion of his studies. There is nothing whatsoever inconsistent in a conscientious objector seeking a student's deferment.

Appellee also asserts two other grounds upon which to denigrate appellant's sincerity. ARB 12 states:

"There are also incongruities in the registrant's statements and conduct which cast doubt on his sincerity. The registrant stated that he was trained in the basis for his beliefs by his parents from earliest childhood and that his experiences abroad had reinforced them [Ex. 46]. Yet the registrant told the hearing officer that he began to think about his values and attitudes at the age of 19, associating the event with the arrival of his first draft notice [Ex. 73]."

This imaginary doubt falls apart upon closer inspection of the facts as presented by the record rather than as paraphrased by appellee.

As appellant explained to the local board at his personal appearance [Ex. 58], his father was a minister recognized by a sect although without formal ordination. Appellant had rejected much of his family's religious beliefs, especially the theology of a "supreme being". Thus it is apparent that appellant did not simply adopt wholesale the attitudes and beliefs of his parents but went through a process of evaluation of the ethical and religious training he had received as a child.

The Hearing Officer himself noted that "He explained that it was not until the Fall of 1963 that he had fully made up his mind . . ." [Ex. 73].

Appellant did not begin to think seriously about his beliefs, the bases for which had been absorbed from his family during his childhood, until the government brought him face to face with the problem by sending him his first draft notice at age 19. This is entirely consistent with the picture of slowly maturing beliefs that he consistently presented and is in no way an "incongruity".

Appellee is again on weak ground when the reinforcement of appellant's developing belief, occasioned by his travels abroad, is cavilled at for not producing instant conviction [ARB 13]. That an event reinforced a ripening belief in no way implies that the reinforcement should immediately produce the final crystallization of that belief. Appellee's denigration of appellant's sincerity on this ground proceeds entirely from the false assumption that it should.

Appellee relies upon two cases, *Witmer v. United States*, (1955) 348 U.S. 375 and *United States v. Corliss*, (2nd Cir., 1960) 280 F.2d 808. Both of those cases contain many dissimilarities to the instant appeal and are distinguishable.



The major distinction between *Witmer* and the instant appeal is that Witmer claimed conscientious objector status (as one of Jehovah Witnesses) in his first Classification Questionnaire and thereafter did and said things inconsistent with that claim. Our appellant's belief did not fully mature until November, 1963, after which date nothing appears in the record that is inconsistent with his claim.

Three cases, consolidated for appeal, are reported sub nom *United States v. Corliss*. Convictions were affirmed in all three: Heise, Corliss and Harold. All are distinguishable on their facts.

In *Heise*, there was a "sudden accession of belief" which was considered to be a relevant factor but that factor was coupled with the registrant's inability to state the Biblical source for his alleged belief, on which he claimed to rely, without reference to typewritten notes. These notes appeared to be a copy of a letter that had been submitted to the local board. This latter fact created the strong inference that the notes and belief were the product of someone else's mind.

*Corliss* is interesting because it points out some of the things that the court considered "unimpressive" to establish a basis in fact for rejecting his claim on sincerity grounds. These include, inter alia, that the registrant had never been baptized in the sect whose tenets he claimed to hold and that he said he was seven or eight years old when he decided that he could not serve in the Army.

Contrary to appellee's contention, Corliss's conviction was not sustained because he lacked sincerity but because one element of a conscientious objector claim was missing. The Court cited two elements: (1) a personal conviction (2) based upon religious training and belief. There was "enough although barely enough" to sustain a finding that

Corliss lacked a “personal” belief in the conscientious objection tenets of his sect in that (a) he showed unfamiliarity with the scriptural references on which his claimed belief rested; (b) his minister father had helped him prepare his Special Form for Conscientious Objector; and (c) his answers had an impersonal quality.

All of the factual elements that were relied upon by the Court in *Corliss* are absent from the present appeal. No question was raised about the “personal” quality of appellant’s belief.

In the third case, *Harold*, the court found a basis in fact in the synchronization of his interest in the Jehovah Witnesses with the Order to Report for Induction, coupled with the additional factor that he brought a witness to his personal appearance and also to his Hearing Officer hearing who prompted him in his answers. In our appellant’s case, on the contrary, there is no suggestion that appellant’s beliefs were someone else’s rather than his own.

*Witmer* does, as appellee asserts [ARB 9], establish that insincerity is a ground for denying a conscientious objector claim but it does not stand for the proposition that insincerity is a basis in fact to deny a claim where the only “fact” is the fact that the Hearing Officer said he was insincere. There must be “facts which cast doubt on the veracity of the registrant . . . we must examine the *objective* facts before the Appeal Board to see whether they cast doubt on the sincerity of his claim”. (348 U.S. 375, 381, 382, emphasis supplied).

Appellee cites a passage from *Corliss* to the effect that disbelief in a registrant’s sincerity need not be accompanied “by any inconsistent facts provided the disbelief is honest and rational.” (280 F. 2d 808, 814). This rather loose dictum of the Second Circuit appears to be incon-



sistent with the statement of the Supreme Court in *Witmer* that objective facts must support the disbelief (see *supra*). Immediately following the cited statement in *Corliss*, however, the Court goes on to cite a case holding that a registrant's demeanor in a personal appearance could support the disbelief (we note again that appellant's demeanor was not mentioned by the Hearing Officer as having anything to do with his conclusion that appellant was insincere). Furthermore, the Second Circuit stated:

"On the other hand, to sustain the denial of a claim on a mere ipse dixit of lack of sincerity from the local board or the Hearing Officer would create serious possibilities of abuse . . . The Court, in effect, must determine, as best it can, whether the local board or the Hearing Officer and, ultimately, the appeal board were rational and sincere in disbelieving the sincerity of registrant's belief in the absence of conduct inconsistent with the registrant's assertion, . . ." (280 F.2d 808, 814).

Appellant respectfully submits that this language shows that the Second Circuit and the Supreme Court are not at odds over the question of the need for objective facts to support the Hearing Officer's assertion of disbelief in the registrant's sincerity. A disbelief not based on either the registrant's demeanor or on objective facts presented by his statements or history is not a rational disbelief.

Appellant, in his Opening Brief, relied on *Annett v. United States*, (10th Cir., 1953) 205 F.2d 689, 691, for the proposition that a mere statement that a registrant is insincere without stating relevant facts upon which such disbelief is based "does not rise to the dignity of evidence." Appellee attempts to distinguish *Annett* upon the grounds that while the finding of the Hearing Officer was in fact reversed, the finding of insincerity was not based upon personal observation [ARB 12]. There is no relevant dis-

inction between the *Annett* and the instant case. In both cases, the Hearing Officer did not make any statement to the effect that he based his decision on the registrant's demeanor. In both cases, the Hearing Officer had ample opportunity to observe the demeanor of the registrant and to record his reaction to it, if any. Appellant here appeared before the Hearing Officer for an interview. *Annett* appeared before his Hearing Officer not once but twice for two separate interviews. Far from being a situation where the Hearing Officer had not made a personal observation, the *Annett* case was a situation where the Hearing Officer had more opportunity for personal observation than did our appellant's Hearing Officer.

Both in *Annett* and here, the Hearing Officer made the unsupported statement that the registrant was insincere. In *Annett*, the Court searched the record for something to support that statement and, finding nothing, reversed.

In *Annett*, the Hearing Officer had heard testimony from a witness who made the unsupported statement that the registrant was insincere. The reversal was not based on an improper reception of that evidence, as the Appellee here seems to argue, but on the absence of supporting facts plus the application of an erroneous standard. The basis for the Hearing Officer's statement in *Annett* was, if anything, stronger than that here.

Furthermore, as appellant pointed out in his Opening Brief (pp. 12-19), the Hearing Officer cited many improper standards: non-membership in a pacifist church, appellant's attitude regarding physical defense of himself and his family in the event of an attack, that he had stated "I don't know" in answer to the Supreme Being question, etc. Just as the possibility that the Hearing Officer had relied upon the unsupported opinion of the witness tended to

vitiate the Hearing Officer's statement in *Annett*, so here, the Hearing Officer's express citation of improper standards as factors influencing his opinion, vitiates his statement that appellant was not sincere.

There being no basis in fact for a finding of insincerity, there is no basis in fact to deny a conscientious objector classification to appellant. Thus the denial of that classification to appellant was arbitrary, capricious and contrary to law. A conviction based upon such a classification should not stand.

## II

### **APPELLANT WAS DENIED DUE PROCESS BY THE MANNER IN WHICH THE HEARING OFFICER'S HEARING WAS CONDUCTED WHICH DEPRIVED HIM OF THE OPPORTUNITY TO HAVE BOTH HIS WITNESSES SPEAK**

Even though the Court believed the Hearing Officer's testimony that he told the witnesses that only one of them would be permitted in the room at a time, this does not reach the heart of the matter. It is not disputable that the witnesses understood him to say that only one would be allowed at all (see Opening Brief pp. 19-21). Furthermore, it should be noted that this was a mere observation by the District Judge and not a formal finding of fact as such findings were waived by stipulation as is the unvarying custom in criminal trials by the court sitting without a jury in the (Southern District, Central Division) Central District of California.

Appellee cites *Uffelman v. United States*, (9th Cir., 1956) 230 F.2d 297, for the proposition that a refusal by a Hearing Officer to hear a proffered witness would not be a violation of the registrant's constitutional or statutory rights. This case predicates its reasoning on the statement,

"Proceedings before a Selective Service Board are not a trial." (p. 303).

Be that as it may, even a Selective Service registrant should be entitled to have a trial on the facts somewhere before he is deprived of his liberty and confined in a federal prison. In the District Court, he is faced with the well established rule that any basis in fact will support the ruling of the Selective Service System. If he is not entitled to something analogous to a trial as recognized by English and American law at some point in the administrative procedure, then the federal courts are reduced to rubberstamping an administrative fiat that the man be deprived of his liberty.

Furthermore, it should be noted that *Uffelman* concerned denial of witnesses at a personal appearance before a local board. In the instant case, we are dealing with the denial of an effective opportunity to present a witness at the hearing before a Department of Justice Hearing Officer. Such Hearing Officer, unlike most local board members, is an attorney and not likely to be confused by trial-like procedures.

Abbreviated procedures, such as those here, have often provoked District Judges. In *United States v. Glessing*, (U.S.D.C. Minn., 1951) No. 8173, Judge Matthew M. Joyce stated (at page 3 of the partial transcript):

"... Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already told the board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way



to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the board doesn't know or didn't know because the board wouldn't proceed to hear them."

In *United States v. Walter Kobil*, (U.S.D.C. E.D. Mich., 1951) No. 32,390, District Judge Frank A. Picard stated (at page 4 of the partial transcript):

"... He said he wanted to be heard. He came down there with two witnesses. They wouldn't let the witnesses in.

"That was wrong, unless it appeared that his witnesses were creating some kind of disturbance or were there for the purpose of preaching Jehovah's Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and un-American. The boards might as well find it out now as anytime.

"Now the fact that this man won't salute the flag makes my blood boil; and the fact that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this,..."

If *Uffelman* is to be rigorously followed, a registrant is placed in a closed circuit. He is denied a trial on the facts in the District Court by the narrow scope of review doctrine and he is denied a trial on the administrative level by the dictum that such proceedings "are not a trial." Thus he is sent to prison without ever having had a trial and an opportunity to fully develop his side of the case, to explain

and rebut apparently derogatory information about himself by presenting witnesses in his favor.

In *Uffelman* a hearing before the local board was involved. In our appeal a hearing before a Hearing Officer is involved. The applicable regulations are vastly different.

*Local Board:* The rules for this hearing are found in 32 C.F.R., Part 1624:

**“Part 1624—Appearance Before Local Board**

**“1624.1 Opportunity to Appear in Person.—(a)**

Every registrant, after his classification is determined by the local board except (1) a classification which is determined upon an appearance before the local board under the provisions of this part or (2) a classification in Class I-C, Class I-W, Class IV-F, or Class V-A, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

“(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided*, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further*, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.”

We state to the Court, going outside the record, that all the boards, with rare exception, uniformly interpret the above rules to permit them to forbid the registrant *any* witness and that for the last past 30 months they have uniformly been forbidding witnesses.



*Hearing Officer:* The rules for this are in the Instructions to all Department of Justice Hearing Officers Appointed Pursuant to the Universal Military Training and Service Act and are found in Departmental Memorandum No. 41.

The standard, printed invitation to the registrant is set forth in Appendix A.

We state to the Court we have appeared with many registrants at such hearings. At some of these hearings as many as ten or a dozen friends of the registrant were admitted; at none was the attendance limited to 1 or 2 at a time.

### III

#### **APPELLANT'S DUE PROCESS POINTS WERE RAISED DURING TRIAL AND SHOULD BE CONSIDERED ON APPEAL**

Appellee argues that no issue was raised during trial by appellant as to the two denials of due process of law that occurred at the Induction Station [ARB 15].

Not only were these issues raised during trial but they were raised by appellee. Both issues appear on the face of the records contained in the Selective Service file which the appellee introduced and which was received in evidence as the Appellee's Exhibit.

Appellee offered the whole Selective Service file for the Court's consideration and the whole was received. Appellee did not select from the file those facts tending to show that appellant had been ordered to submit for induction and had refused. Instead, appellee offered the whole and let the trial judge ferret out those facts for himself.

Appellee now implies that the Court, in viewing the evidence appellee offered, should close one eye and only

see those facts favorable to appellee's case. The government stands on weak ground when it asserts that the District Judge was not given an opportunity to consider facts which the government itself presented to the Court.

Similarly, if the appellee now relies on some implied waiver by appellant of the due process issues raised by the evidence the government itself presented, then the appellee has the burden of proving the existence of such a waiver.

Appellee cites two cases to support the contention that points not raised in the District Court cannot be raised on appeal. Neither holds that a point raised in the District Court in the manner that appellant's due process points were raised cannot be relied upon on appeal.

In *Elder v. United States*, (9th Cir., 1953) 202 F.2d 465, the defendant did not raise at trial his point that the FBI report to the Department of Justice had not been placed in the Selective Service file. He raised the question on appeal and the Court said:

"The record before us includes the file and an examination of the latter discloses that it does not contain the report. While normally the Court will not consider points not presented below, we think that in the posture of the present case the question now raised should in fairness be noticed, more particularly because the Second Circuit has recently held that the failure to place the FBI report in the file constitutes a violation of § 6(j) of the Act, and renders the proceeding a nullity. *United States v. Nugent*, 2 Cir., 200 F.2d 46." (p. 468)

Appellant's file, on the other hand, does raise the points because the documents showing failure to comply with the Regulations (the physical examination forms and the DD Form 98) are contained in the file. Thus, the factual situation in *Elder* was one step beyond the situation presented

here. There the point concerned the absence of evidence from the file the government presented, here the points concern evidence present in the file introduced by the government.

The other case cited by appellee, *Robbins v. United States*, (9th Cir., 1965) 345 F.2d 930, is not in point at all with the present situation. There, a bank robber complained on appeal that the sentence imposed was beyond the statutory limit. He had not made a motion for reduction of that sentence in the trial court. The appellate court refused to consider the point because it was still possible to raise it in the District Court, an illegal sentence being correctible at any time.

Here, of course, there is no way to have the District Court correct its error, it cannot acquit appellant on the basis of the two denials of due process unless the appellate court takes cognizance of the questions presented.

The other four cases cited by appellee on this point show that the general rule, that matters not raised below may not be raised for the first time on appeal, is a rule that depends on the specific fact situation for its applicability.

In *Ramirez v. United States*, (9th Cir., 1951) 294 F.2d 277, the defendant did not complain of an instruction at the time it was given, despite Federal Rule of Criminal Procedure 30 which requires an objection to raise an issue as to instructions. The Court, however, stated, "In any event, the charge was proper," indicating that the Court considered the question despite the fact that it had not been sufficiently raised. Also, the entrapment point could not be raised on appeal because the defendant had refused an instruction on entrapment in the District Court.

In *United States v. Miller*, (8th Cir., 1963) 316 F.2d 81, the appellant shifted the ground of his Constitutional objection from the ground on which he relied in the trial court to a new and different ground on appeal.

In *Tyree v. United States*, (5th Cir., 1965) 351 F.2d 611, appellant attempted to rely on an allegation that he had been required to take affirmative action while in a police line-up to help the witness identify him. Facts to support this contention had not been developed in the trial court. (In the instant case all the necessary facts to establish, prima facie, the denials of due process were presented to the court by the government's exhibit; any failure to rebut those facts should be laid at the feet of appellee.)

Finally, in *Grant v. United States*, (9th Cir., 1961) 291 F.2d 746, no instruction on entrapment was requested or given and the appellate court held that that was a prerequisite to raising the question on appeal.

On the instant appeal, we have two glaring denials of due process shown by evidence which the government itself presented to the District Court. It would be unfair to appellant to refuse to consider them, especially in light of the fact that the government does not deny their existence.

Furthermore, the Ninth Circuit has often taken the position that it is free to do justice and has repeatedly taken cognizance of points not raised at all in the trial court. It has considered points raised for the first time on oral argument. For example, see *Chernekoff v. United States*, (9th Cir., 1955) 219 F.2d 721, 724:

"It was said in argument that this omission is in consonance with the practice in Los Angeles County. . . ."



“Likewise, in the course of argument, it was represented and unchallenged that the derogatory information in appellant’s file as to appellant’s religious sincerity concerns a single conviction for drunkenness and another for speeding. . . .”

In *Daniels v. United States*, (9th Cir., 1967) 372 F.2d 407, the court sitting en banc stated:

“During oral argument, counsel for Daniels contended, for the first time in this case, that it was unfair for the Selective Service System officials not to advise Daniels. . . .

\* \* \*

“In view of our holding announced above that Daniels is entitled to assert his defense based on the contention that the classification is invalid, we need not decide this additional question.”

Appellee asserts (ARB 18-19) that the denials of due process did not prejudice appellant. In light of the fact that a shockingly high per cent of those given armed services physical examinations fail them and that appellant was not given the opportunity to take the final examination (and thus be spared the choice between violating his conscience and risking a long federal prison term), the assertion that he was not prejudiced is thin indeed. The prejudice is patent.

Similar is the Induction Station’s failure to offer appellant an opportunity to accomplish DD Form 98 before ordering him to submit to induction. The armed services think this Security Questionnaire to be of sufficient importance that the applicable regulation governing Induction Station procedures (Army-Regulation 601-270) provides in Section 80 B (2):

"A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (see AR 604-10) or who discloses significant derogatory information with respect to his background, or who invokes constitutional privileges . . . will not be inducted into the Armed Forces pending completion of a thorough investigation."

We do not know if appellant would have failed or refused to sign the DD Form 98 because he was never given the opportunity to do so. If he had been given the opportunity and had failed or refused, he could not have been ordered to submit to induction at that time. The Army did not give him that opportunity but instead rushed him to his choice. Again, the prejudice is patent.

Far from being the "technical procedural objections" which appellee characterizes them, these two failures to follow their own Regulations deprived appellant of significant opportunities to escape the position where his commitment to his principles forced him to risk prison.

Respectfully submitted,

J. B. TIETZ and  
MICHAEL HANNON  
*Attorneys for Appellant*

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ AND  
MICHAEL HANNON  
410 Douglas Building  
257 South Spring Street  
Los Angeles, California 90012  
*Attorneys for Appellant*

MAY 19, 1967



## APPENDIX A

### ADDENDUM No. I TO INSTRUCTIONS TO SPECIAL HEARING OFFICER FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

#### **Notice of Hearing and Instructions to Registrants Whose Claims for Exemption As Conscientious Objectors Have Been Appealed**

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious-objector claim only. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Special Hearing Officer for the Department of Justice, appointed by the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious-objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no

Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his conscientious-objector claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths. Such statements or documents will be considered for whatever bearing they may have upon the registrant's conscientious-objector claim. They will not be considered in connection with any other claim whatsoever.

5. Attached hereto is a resumé of the information developed by the inquiry conducted pursuant to the aforementioned Act. If the registrant wishes to deny, explain, or otherwise comment upon any information contained in the resumé, he should do so in a written statement to the Hearing Officer. At the hearing the registrant will be entitled to discuss the information contained in the resumé and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Technical rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any arguments concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of

choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

-----  
Special Hearing Officer  
for the Department of Justice



**In the United States Court of Appeals  
for the Ninth Circuit**

---

**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**HASKEL ENGINEERING & SUPPLY COMPANY, APPELLEE**

---

**On Appeal From the Judgment of the United States  
District Court for the Southern (Now Central)  
District of California**

---

**BRIEF FOR THE APPELLANT**

---

**MITCHELL ROGOVIN,**  
*Assistant Attorney General,*

**LEE A. JACKSON,  
HAROLD C. WILKENFELD,  
SOLOMON L. WARHAFTIG,**  
*Attorneys,  
Department of Justice,  
Washington, D.C. 20530*

***Of Counsel:***

**JOHN VAN DE KAMP,**  
*United States Attorney.*

**CHARLES H. MAGNUSON,**  
*Assistant United States Attorney.*

**FILED**

**JAN 12 1917**

---

**WM. B. LUCK, CLERK**





# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statutes and Regulations involved .....	2
Statement .....	5
Specification of errors relied upon .....	9
Summary of argument .....	10
Argument:	
I. The District Court erred in holding that taxpayer had proven its entitlement to the bad debt deductions that it sought .....	13
II. The District Court erred in holding that taxpayer was entitled to deductions for the payments to its stockholders with respect to the "debentures" .....	19
A. The District Court applied an erroneous standard .....	19
B. The "debentures" in reality constituted part of the capital investment in taxpayer .....	22
C. In any event, the "redemption premium" payments were not deductible .....	28
Conclusion .....	30
Appendix .....	32

## CITATIONS

### Cases:

<i>Affiliated Research, Inc. v. United States</i> , 351 F. 2d 646 .....	28
<i>American State Bank v. United States</i> , 279 F. 2d 589 .....	17
<i>Art Metal Const. Co. v. United States</i> , 17 F. Supp. 854 .....	15

## Cases—Continued

Page

<i>Baltimore Steam Packet Co. v. United States</i> , 180 F. Supp. 347 .....	28
<i>Calavo, Inc. v. Commissioner</i> , 304 F. 2d 650.....	14, 15
<i>Coe, S. W., &amp; Co. v. Dallman</i> , 216 F. 2d 566.....	14-15
<i>Commissioner v. P. G. Lake, Inc.</i> , 356 U.S. 260....	20
<i>Commissioner v. Meridian &amp; Thirteenth R. Co.</i> , 132 F. 2d 182 .....	24
<i>Consolidated-Hammer Dry Plate &amp; Film Co. v. Commissioner</i> , 317 F. 2d 829 .....	15
<i>Foster Frosty Foods, Inc. v. Commissioner</i> , 332 F. 2d 230 .....	14
<i>Gilbert v. Commissioner</i> , 248 F. 2d 399, on appeal from remand, 262 F. 2d 512, certiorari denied, 359 U.S. 1002 .....	28
<i>Gregory v. Helvering</i> , 293 U.S. 465 .....	20
<i>Helvering v. Richmond, F. &amp; P. R. Co.</i> , 90 F. 2d 971 .....	24
<i>Interstate Transit Lines v. Commissioner</i> , 319 U.S. 590 .....	21
<i>Kelly v. Central Hanover Bank &amp; Trust Co.</i> , 11 F. Supp. 497, reversed and remanded, 85 F. 2d 61..	25
<i>Kruse, O. H., Grain &amp; Milling, v. Commissioner</i> , 279 F. 2d 123 .....	22, 28
<i>Maverick-Clarke Litho Co. v. Commissioner</i> , 180 F. 2d 587 .....	15
<i>Morris Plan Ind. Bank v. Commissioner</i> , 151 F. 2d 976 .....	15
<i>Municipal Bond Corp. v. Commissioner</i> , 341 F. 2d 683 .....	22
<i>Nassau Lens Co. v. Commissioner</i> , 308 F. 2d 39..	27
<i>Paramount Finance Co. v. United States</i> , 304 F. 2d 460 .....	14
<i>Paramount Liquor Co. v. Commissioner</i> , 242 F. 2d 249 .....	15
<i>Patterson v. Pizitz, Inc.</i> , 353 F. 2d 267, certiorari denied, 383 U.S. 910 .....	14, 15, 17
<i>Reinecke v. Spalding</i> , 280 U.S. 227 .....	14
<i>Schulz v. Commissioner</i> , 294 F. 2d 52 .....	20
<i>Tressler v. Commissioner</i> , 228 F. 2d 356 .....	21
<i>Trousdale v. Commissioner</i> , 219 F. 2d 563 .....	20

### III

Cases—Continued	Page
<i>United States v. Intermountain Furniture Mfg. Co.</i> , 363 F. 2d 554 .....	22
<i>Wilbur Security Co. v. Commissioner</i> , 279 F. 2d 657 .....	22, 27

#### Statutes:

##### Internal Revenue Code of 1954:

Sec. 162 (26 U.S.C. 1964 ed., Sec. 162) .....	2
Sec. 163 (26 U.S.C. 1964 ed., Sec. 163) .....	3
Sec. 166 (26 U.S.C. 1964 ed., Sec. 166) .....	3
Sec. 312 (26 U.S.C. 1964 ed., Sec. 312) .....	28
National Housing Act, c. 847, 48 Stat. 1246, Sec. 403 (12 U.S.C. 1964 ed., Sec. 1726) .....	26

#### Miscellaneous:

1 Dewing, Financial Policy of Corporations (5th Ed.), pp. 228-230 .....	25
N. Y. Times, June 1, 1957, p. 24, cols. 7 and 8.....	29
N. Y. Times, April 17, 1958, p. 51, cols. 7 and 8....	29
Treasury Regulations on Income Tax (1954 Code), Sec. 1.166-4 (26 C.F.R., Sec. 1.166-4) .....	4
Winn and Hess, The Value of the Call Privilege, 14 Journal of Finance 182, 187 (1959) .....	26



**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 21104

UNITED STATES OF AMERICA, APPELLANT

*v.*

HASKEL ENGINEERING & SUPPLY COMPANY, APPELLEE

---

**On Appeal From the Judgment of the United States  
District Court for the Southern (Now Central)  
District of California**

---

**BRIEF FOR THE APPELLANT**

---

**OPINION BELOW**

The memorandum opinion of the District Court (I-R. 196)<sup>1</sup> is not officially reported.

**JURISDICTION**

This appeal involves federal income taxes for the taxable years 1957, 1958, and 1959. The taxes in dispute were paid on August 1, 1963. A claim for refund was filed on August 5, 1963, and has not been rejected. Within the time provided in Section 6532

---

<sup>1</sup> "I-R." and "II-R." references are to Volumes I and II of the record on appeal.



of the Internal Revenue Code of 1954, on March 10, 1964, the taxpayer commenced this action in the District Court to recover the taxes paid. (I-R. 117, 127-128.) Jurisdiction was conferred on the District Court by 28 U.S.C., Sections 1340 and 1346. The judgment of the District Court was entered on February 10, 1966. (I-R. 222-224.) Within 60 days thereafter, on April 8, 1966, a notice of appeal was filed by the United States. (I-R. 225-226.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

### QUESTIONS PRESENTED

1. Whether the District Court erred in holding that taxpayer sustained its burden of showing an abuse of discretion in the Commissioner's determination of reasonable additions to taxpayer's bad debt reserve.

2. Whether the District Court erred in holding that taxpayer's "interest" payments to its stockholders with respect to certain "debentures" qualified for deductions.

3. Whether the District Court erred in holding that taxpayer's "redemption premium" payments to its stockholders with respect to the "debentures" qualified for deductions.

### STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSE.

(a) *In General*.—There shall be allowed as a deduction all the ordinary and necessary expens-

es paid or incurred during the taxable year in carrying on any trade or business \* \* \*

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 162.)

#### SEC. 163. INTEREST.

(a) *General Rule.*—There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 163.)

#### SEC. 166. BAD DEBTS.

(a) *General Rule.*—

(1) *Wholly worthless debts.*—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

(2) *Partially worthless debts.*—When satisfied that a debt is recoverable only in part, the Secretary or his delegate may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

\* \* \* \*

(c) *Reserve for Bad Debts.*—In lieu of any any deduction under subsection (a), there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts.

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 166.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.166-4 *Reserve for bad debts.*

(a) *Allowance of deduction.* A taxpayer who has established the reserve method of treating bad debts and has maintained proper reserve accounts for bad debts or who, in accordance with paragraph (b) of § 1.166-1, adopts the reserve method of treating bad debts may deduct from gross income a reasonable addition to a reserve for bad debts in lieu of deducting specific bad debt items.

(b) *Reasonableness of addition to reserve.*—

(1) *Relevant factors.*—What constitutes a reasonable addition to a reserve for bad debts shall be determined in the light of the facts existing at the close of the taxable year of the proposed addition. The reasonableness of the addition will vary as between classes of business and with conditions of business prosperity. It will depend primarily upon the total amount of debts outstanding as of the close of the taxable year, including those arising currently as well as those arising in prior taxable years, and the total amount of the existing reserve.

(2) *Correction of errors in prior estimates.*—

In the event that subsequent realizations upon outstanding debts prove to be more or less than estimated at the time of the creation of the existing reserve, the amount of the excess or inadequacy in the existing reserve shall be reflected in the determination of the reasonable addition necessary in the current taxable year.

\* \* \* \*

(26 C.F.R., Sec. 1.166-4.)

## STATEMENT

During the years 1946 through 1952 Richard L. Hayman and Don W. Driskel, who were mechanical engineers, operated the Haskel Engineering & Supply Company, a partnership whose business activities consisted of the design and development and the sale and service of various kinds of parts and equipment. Hayman had a 60 percent interest and Driskel a 40 percent interest in the partnership. During May and June, 1952, three new corporations and a new partnership were formed to carry on the various aspects of the old partnership. The taxpayer, Haskel Engineering & Supply Company, a California corporation, was organized in June, 1952, to take over the part of the business concerned with the wholesale distribution and retail sale of hydraulic parts and equipment. (I-R. 118-119, 121-122.)

In June, 1952, the old partnership transferred to taxpayer those of its assets that were needed in the operation of the hydraulic parts and equipment business. The following is a list of these assets and the values at which they were carried on the partnership books (I-R. 122):



	Value per Partnership Books
Inventories	\$30,595.55
Account receivable	28,232.24
Furniture and fixtures	5,841.75
Leasehold improvements	3,377.38
Equipment	1,757.08
Automobiles	1,187.04
Prepaid rent	1,360.00
Prepaid insurance	195.47
Prepaid office expense	164.50
Deposits	27.75
<b>TOTAL</b>	<b>\$72,738.76</b>

The form of the transfer of the partnership assets to taxpayer was an exchange of assets having a basis to the partnership of \$8,738.76 and goodwill, which had not been shown on the partnership books but which was recorded on the corporation's books at \$14,000, for 1,500 shares of taxpayer's no par value capital stock and, at the same time, an exchange of the inventories, accounts receivable and most of the furniture and fixtures, having a total basis to the partnership of \$64,000, for taxpayer's "Series A Four Percent Registered Debenture Bonds" in the face amount of \$64,000. (I-R. 121-123; II-R. 12-13.)

The "debentures"<sup>2</sup> that taxpayer issued to its stockholders had a stated term of 20 years. They were unsecured, did not provide for a retirement sinking fund and contained no provisions limiting the

---

<sup>2</sup> A copy of one of the "debentures" was received in evidence as plaintiff's Exhibit 13. (I-R. 130; II-R. 25.) A copy of one of the "debentures" is reproduced at page 23 of Volume I of the record.



payment of dividends, the incurring of additional liabilities, or the mortgaging of the corporation's assets. They provided for annual "interest" payments of 4 percent. They also provided for payment of a "redemption premium" of 2 percent of the amount of the "debentures" being redeemed times the number of years by which maturity was being accelerated, which, under their terms, could be as many as 18 years. (I-R. 23.)

Taxpayer never formally declared or paid any dividends with respect to its capital stock. (I-R. 126.) During the taxable years ended May 31, 1957, and May 31, 1958, taxpayer made "interest" payments of \$2,599.92 and \$2,053.26, respectively, on the "debentures." (I-R. 125.) In these years it also made the following "redemption premium" payments (I-R. 125):

<u>Taxable Year Ending</u>	<u>Face Amount of "Debentures" Redeemed</u>	<u>"Redemption Premiums" Paid</u>
May 31, 1957	\$30,000	\$ 9,600
May 31, 1958	32,000	10,500

On its tax returns for the years ended May 31, 1957, and May 31, 1958, taxpayer claimed deductions for these "interest" and "redemption premium" payments that it had made to its stockholders. (I-R. 125.)

Taxpayer employed the reserve method of accounting for bad debts. The average ratio of uncollectible accounts charged against the reserve to accounts receivable at the beginning of each year was 1.381 per-

cent for the taxable years 1954 through 1957, 1.2116 percent for the taxable years 1954 through 1958, and .93219 percent for the taxable years 1954 through 1959. As of May 31, 1958, and May 31, 1959, taxpayer's accounts receivable balances were \$236,828.98 and \$321,367.83, respectively. The balances in the reserve, before any additions for those years, were \$3,426.51 and \$2,078.54, respectively. On its returns for these years taxpayer claimed deductions of \$3,313.80 and \$1,800, respectively, for additions to the reserve. (I-R. 126-127.)

The Commissioner determined the reasonable additions to taxpayer's bad debt reserve for the taxable years 1958 and 1959 by applying to the accounts receivable balances at the end of each of these years taxpayer's average bad debt loss rate for the period 1954 through the year involved. Accordingly, the Commissioner determined that the additions to the reserve for the taxable years 1958 and 1959 were excessive by the amounts of \$3,313.80 and \$882.75, respectively, and to that extent disallowed the claimed deductions. The Commissioner also determined that taxpayer's "interest" and "redemption premium" payments with respect to its "debentures" did not qualify for deductions. The Commissioner determined tax deficiencies based on the disallowance of these deductions. (I-R. 127.)

Taxpayer paid the deficiencies determined by the Commissioner for its taxable years 1957, 1958 and 1959 and on March 10, 1964, no action having been taken on its claims for refund of the amount of the deficiencies commenced this suit in the District Court

to recover these taxes. (I-R. 127-128.) On January 14, 1966, the District Court filed a memorandum opinion (I-R. 196) holding that taxpayer was entitled to all of the deductions that it claimed. On February 10, 1966, the court accepted the findings of fact and conclusions of law submitted by counsel for the taxpayer (I-R. 212-220) and entered judgment in favor of taxpayer (I-R. 222-223). This appeal is taken by the Government from that judgment.

### **SPECIFICATION OF ERRORS RELIED UPON**

1. The District Court applied an erroneous standard in deciding the amounts of the additions to taxpayer's bad debt reserve that qualified for deductions.

2. The District Court erred in holding that taxpayer had proven its entitlement to the bad debt deductions that it claimed.

3. The District Court applied an erroneous standard in deciding whether taxpayer's payments with respect to its "debentures" qualified for deductions.

4. The District Court erred in holding that the "debentures" that taxpayer issued to its stockholders constituted indebtedness within the meaning of Section 163(a) of the Internal Revenue Code of 1954.

5. The District Court erred in holding that taxpayer was entitled to deductions for its "interest" payments to its stockholders with respect to the "debentures".

6. The District Court erred in holding that taxpayer was entitled to deductions for its "redemption premium" payments to its stockholders with respect to the "debentures."

## SUMMARY OF ARGUMENT

The questions presented on this appeal concern the correctness of the District Court's determinations with respect to certain deductions claimed by taxpayer in the computation of its taxable income for the years 1957, 1958 and 1959. We submit that the District Court applied incorrect standards in its consideration of these questions and erred in holding that taxpayer was entitled to the deductions that it sought.

1. Under the statutory provision permitting a deduction for a reasonable addition to a reserve for bad debts the Commissioner is vested with the discretion to determine what is a reasonable addition. A taxpayer seeking to controvert the Commissioner's determination of the amount of the addition that is required to bring the reserve to an adequate level must therefore show that it constitutes an abuse of his discretion. The ratio of accounts charged against taxpayer's reserve to its accounts receivable at the beginning of each year was a constantly improving one. Accordingly, the Commissioner's determinations of the proper additions to taxpayer's reserve, which were based on taxpayer's average bad debt loss rate for the period 1954 through the year in question, were not only reasonable, but favorable to taxpayer. The only evidence offered by taxpayer in support of its attempt to controvert the Commissioner's determinations was the testimony of two of its officers wherein they stated that they had analyzed taxpayer's accounts receivable and had decided that the amounts of the claimed deductions were proper additions to



the reserve. Since this unsupported, self-serving decision by taxpayer's officers as to what, in their opinion, constituted proper additions to the reserve did not show any error in the Commissioner's determinations, the court's holding that taxpayer was entitled to the claimed bad debt deductions was erroneous; for it improperly shifted to the taxpayer's officers the discretion to determine reasonable additions to the reserve and required the Commissioner to show an abuse of discretion on their part.

2. The District Court also applied an erroneous standard in determining that taxpayer's "interest" and "redemption premium" payments to its stockholders with respect to its "debentures" were deductible. In order to qualify for a deduction the taxpayer must show that what was done is in reality that which is contemplated by the statutory provision authorizing the deduction. The District Court, however, did not consider the true nature of the payments but, the Government not having shown any fraud in the issuance of the "debentures", held that the payments with respect to them were deductible. An examination of the substance of what was done, rather than merely of the forms used, compels the conclusion that these payments did not qualify for deductions as "interest \* \* \* on indebtedness" or "ordinary and necessary expenses" of taxpayer's business.

Taxpayer's issuance of the "debentures" to its stockholders did not, in substance, create a true debtor creditor relationship between them. Almost all of the tangible assets that taxpayer required in its busi-



ness were transferred to it, in exchange for the “debentures”, by its stockholders, who also personally guaranteed a line of bank credit in its behalf. The 20-year “debentures” that taxpayer issued to its stockholders were unsecured and contained none of the protective provisions that an arm’s-length creditor making a long-term loan demands; no one but a stockholder would have advanced funds to the corporation on the basis of such an instrument. Moreover, the return that the stockholders were to receive with respect to the “debentures” was not the fixed compensation for the risks incurred that is normally received by a creditor, but a sharing in taxpayer’s profits, which is the normal return of one making a capital investment. While the 4 percent “interest” rate provided for in the “debentures” was much less than the return that an outsider would have demanded for such an advance, the “debentures” also provided for “redemption premium” payments of as much as 36 percent of their face amount, which was many times greater than a normal redemption premium; so that the return to taxpayer’s stockholders with respect to the “debentures” would bear no relation to the risks incurred in making the investment that they evidenced. Since the “debentures” in reality represented part of the capital investment in taxpayer’s business, rather than true indebtedness within the meaning of the Internal Revenue Code, the payments constituted distributions of earnings with respect to equity interests, which are not deductible.

In any event, regardless of the true nature of the “debentures”, the “redemption premium” payments that were made to taxpayer’s stockholders were not deductible. These payments (at the rate of 32 percent) were not reasonable in amount, but were many times greater than normal redemption premiums. Since taxpayer’s net cost of retaining the funds used to redeem the “debentures” would have been less than the yield on United States Government bonds, the early redemption was not to taxpayer’s corporate advantage, but benefited only its stockholders. The payment of the “redemption premiums” was extraordinary and unnecessary and would not even qualify as a business expense under Section 162(a) of the 1954 Code, let alone as interest.

## ARGUMENT

### I

#### **The District Court Erred in Holding That Taxpayer Had Proven Its Entitlement to the Bad Debt Deductions That It Sought**

Taxpayer seeks deductions for additions to its bad debt reserve for the years 1958 and 1959 in the amounts of \$3,313.80 and \$1,800, respectively. The Commissioner determined that taxpayer was not entitled to an addition in 1958 and that a proper addition for 1959 was limited to \$917.25. The District Court erroneously, we submit, sustained taxpayer’s position.

In determining the income on which the federal income tax is levied, the statute provides a deduction from gross income for bad debts. Internal Revenue

Code of 1954, Section 166, *supra*. This provision allows a deduction as of right for any debt which becomes worthless within the taxable year (Section 166(a)), or, alternatively, it provides that there is "allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts" (Section 166(c)).

In any action for the refund of federal income taxes, the determination of the Commissioner is presumptively correct, and the taxpayer has the burden of disproving that determination by showing that he clearly comes within a statutory provision allowing the claimed deduction and by proving the amount of the deduction to which he is entitled. *Reinecke v. Spalding*, 280 U.S. 227, 232-233. In dealing with a deduction for a reasonable addition to a reserve for bad debts the Commissioner's determination is entitled to even greater weight, since he is vested by Section 166 (c) with the discretion to determine what is a reasonable addition. Accordingly, where, as in the instant case, taxpayer seeks to controvert the Commissioner's determination disallowing a claimed deduction for such an addition, the issue is whether the Commissioner has abused his discretion, and taxpayer has the burden of showing such an abuse of discretion. *Calavo, Inc. v. Commissioner*, 304 F. 2d 650, 653-654 (C.A. 9th); *Patterson v. Pizitz, Inc.*, 353 F. 2d 267 (C.A. 5th), certiorari denied, 383 U.S. 910; *Foster Frosty Foods, Inc. v. Commissioner*, 332 F. 2d 230, 232 (C.A. 10th); *Paramount Finance Co. v. United States*, 304 F. 2d 460 (Ct. Cl.); *S. W. Coe &*

*Co. v. Dallman*, 216 F. 2d 566 (C.A. 7th); *Maverick-Clarke Litho Co. v. Commissioner*, 180 F. 2d 587, 592 (C.A. 5th); *Morris Plan Ind. Bank v. Commissioner*, 151 F. 2d 976, 983 (C.A. 2d). This burden of proving an abuse of discretion has been described by this Court as a burden that "falls heavily on the taxpayer." *Calavo, Inc. v. Commissioner, supra*, 304 F. 2d, p. 654. See also *Consolidated-Hammer Dry Plate & Film Co. v. Commissioner*, 317 F. 2d 829, 834 (C.A. 7th); *Patterson v. Pizitz, Inc., supra*, 353 F. 2d p. 270; *Paramount Liquor Co. v. Commissioner*, 242 F. 2d 249, 259 (C.A. 8th).

The Court of Claims summed up the applicable principles as follows (*Art Metal Const. Co. v. United States*, 17 F. Supp. 854, 862-863):

The use of the reserve system in connection with deductions for worthless debts was first permitted in the Revenue Act of 1921 (section 234(a) (5), 42 Stat. 254) and has been continued in substantially the same form. Prior to 1921 deductions for worthless debts could only be allowed when they were ascertained to be worthless and charged off. The new provision for the use of reserves constituted an important departure from the former revenue acts as far as worthless debts were concerned, and also a departure from the method employed with respect to other deductions, in that, by the use of the reserve method, deductions were thereafter allowable without regard to whether evidenced by closed and completed transactions. It is not without significance, therefore, that under the quoted provisions the additions to the reserve must be



reasonable and allowable only in the discretion of the Commissioner. While the Commissioner's exercise of his discretion in this respect is subject to review (cf. *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 48 S. Ct. 87, 72 L. Ed. 249), his determination of a reasonable addition to a reserve is not to be lightly set aside. The burden is on plaintiff to show that the additions which the Commissioner has allowed to the reserve as deductions from income for the years involved are not reasonable. In this there is more than a mere presumption of the correctness of the Commissioner's determination. In addition, we are reviewing exercised discretion which has been confided in the Commissioner.

The Regulations promulgated by the Commissioner (Treasury Regulations on Income Tax (1954 Code), Section 1.166-4(b)(1), *supra*) provide that the reasonableness of an addition to the reserve for bad debts "will depend primarily upon the total amount of debts outstanding as of the close of the taxable year, including those arising currently as well as those arising in prior taxable years, and the total amount of existing reserve." It follows that "In the event that subsequent realizations upon outstanding debts prove to be more or less than estimated at the time of the creation of the existing reserve, the amount of the excess or inadequacy in the existing reserve shall be reflected in the determination of the reasonable addition necessary in the current taxable year." Treasury Regulations on Income Taxes (1954 Code), Section 1.166-4(b)(2), *supra*. Thus, the crux of the matter is not whether the addition to the re-



serve for a particular year bears a reasonable relation to the sales for that year but whether the balance in the reserve is sufficient.<sup>3</sup> In order to prevail taxpayer was obliged to show that the Commissioner's determination that its claimed additions to its bad debt reserve were in excess of the additions that were required to bring the reserve to an adequate level was an abuse of his discretion. *Patterson v. Pizitz, Inc.*, *supra*, 353 F. 2d, pp. 268-269.

During the period from 1954 through 1959, taxpayer's bad debt loss rate (the ratio of the uncollectible accounts charged against its bad debt reserve during the year to its accounts receivable at the beginning of the year) was constantly decreasing. (I-R. 126.) It is apparent, therefore, that the Commissioner's determination as to what were reasonable additions to taxpayer's bad debt reserve for 1958 and 1959,<sup>4</sup> which was based on taxpayer's average bad debt loss rate going back to 1954 (I-R. 126-127), was, in the absence of a showing of special circumstances with regard to the collectibility of the accounts receivable that arose in 1958 and 1959, not only reasonable, but favorable to taxpayer.

---

<sup>3</sup> It is clear that the reserve allowed by Section 166(c) is not a contingency reserve for possible future losses. *American State Bank v. United States*, 279 F. 2d 589-590 (C.A. 7th).

<sup>4</sup> The record shows (I-R. 126-127) that the Commissioner's determination of a reasonable reserve balance (\$2,869.42) as of May 31, 1958, was, in fact, greatly in excess of the amount (\$1,347.97) that was actually charged against the reserve during the following year.

Taxpayer offered no evidence of the existence of any special circumstances with regard to the 1958 and 1959 receivables. The only evidence offered by it in support of its attempt to controvert the Commissioner's determination was the testimony (II-R. 37-39, 93-96) of William Hannam, its accountant and attorney and one of its directors and officers (II-R. 5-6, 43-44), and of Richard Hayman, one of its two stockholders (I-R. 124), that at the end of each year the accounts receivable were analyzed according to their age and a decision was then reached as to the amount that taxpayer's officers felt was a proper addition to the reserve for bad debt.<sup>5</sup> Certainly, taxpayer did not meet its burden of proving that the Commissioner's determination was arbitrary by showing this unsupported, self-serving decision by taxpayer's officers as to what, in their opinion, constituted proper additions to its bad debt reserve.

The District Court's finding (I-R. 218) that the determination by the Commissioner of the reasonable addition to taxpayer's reserve was erroneous because it was without regard to anticipated future events is wholly without support; for there was no evidence whatsoever of anticipated future events that would affect the collectibility of the 1958 and 1959 accounts. In view of this lack of evidence, the court's findings

---

<sup>5</sup> Hannam stated (II-R. 39-42), on cross-examination, that in the early 1950's, after the cessation of the Korean hostilities, the size of taxpayer's sales decreased, and the number of its customers increased. He was unable, however, to state what effect, if any, this had on taxpayer's bad debt loss experience. (II-R. 40-42.)

(I-R. 218) and its comments during the trial (II-R. 117) with respect to this issue<sup>6</sup> indicate that it applied an erroneous standard, placing the burden of proof on the Government to negate the existence of any facts that would make the additions to the reserve that were decided on by taxpayer's officers reasonable ones. Instead of requiring taxpayer to prove an abuse by the Commissioner of his discretion to determine the amount of the bad debt deduction to which taxpayer was entitled, the District Court improperly regarded that discretion as vested in taxpayer's officers and required the Commissioner to show that they had abused it. Since taxpayer failed to prove that the Commissioner had abused his discretion, or even that the additions to the reserve decided on by its officers were reasonable, the District Court erred in not entering judgment in favor of the Government on this issue.

## II

### **The District Court Erred in Holding That Taxpayer Was Entitled to Deductions for the Payments to Its Stockholders With Respect to the "Debentures"**

#### ***A. The District Court applied an erroneous standard***

The District Court also applied an erroneous standard in deciding the questions of the deductibility of taxpayer's payments to its stockholders with respect to the "debentures". The principle that tax consequences depend on the economic substance of what

---

<sup>6</sup> The District Court's memorandum opinion (I-R. 196) ignored this issue.

was done, and not on the forms used, is elementary in the law of taxation. See, e.g., *Gregory v. Helvering*, 293 U.S. 465; *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260, 266-267; *Trousdale v. Commissioner*, 219 F. 2d 563, 568 (C.A. 9th); *Schulz v. Commissioner*, 294 F. 2d 52, 56 (C.A. 9th). In order to qualify for a deduction, therefore, a taxpayer must show that what was done, as a matter of economic reality, lies within the intent of the statutory provision authorizing the deduction. An examination of the forms and labels employed by the parties and of the effect given to the transaction under state law represents only the beginning, and not the end, of the inquiry.

The Internal Revenue Code does not permit a deduction for a corporation's distributions of earnings and profits to its stockholders. Accordingly, taxpayer's "interest" and "redemption premium" payments with respect to its "debentures" are deductible only if, looking beyond the formal arrangements to the underlying economic realities, they constituted "interest \* \* \* on indebtedness"<sup>7</sup> or "ordinary and necessary" business expenses<sup>8</sup> and not merely distributions to stockholders. The District Court's holdings that the "interest" and "redemption premium" payments were deductible were not, however, based on a determination that these payments in reality constituted "interest \* \* \* on indebtedness" or "ordi-

---

<sup>7</sup> Internal Revenue Code of 1954, Section 163(a), *supra*.

<sup>8</sup> Internal Revenue Code of 1954, Section 162(a), *supra*.



nary and necessary” business expenses within the meaning of the respective statutory provisions. The District Court believed that the issue presented here was simply whether the issuance of the “debentures” (II-R. 46) “is a legitimate tax plan or whether it is a subterfuge, has some fraudulent aspects.” See also, to the same effect, I-R. 196; II-R. 47, 99, 115-116, 138, 140, 185-186, 194-195. Under the District Court’s approach the inquiry was erroneously limited to ascertaining whether the “debentures” were enforceable as debt under state law and whether their issuance constituted a fraud against the United States.<sup>9</sup> Determining that the “debentures” were enforceable under state law, and the Government not having shown the presence of fraud, the court held that taxpayer was entitled to the deductions that it sought with respect to the “debenture” payments (I-R. 196), without regard to the true nature of the payments.

But the question here was not whether fraud had been committed; the Government made no allegations of fraud. Rather, the question was: What was the essential nature of the payments to taxpayer’s stockholders? Taxpayer had the burden of demonstrating that the payments came within the purview of Sections 162(a) or 163(a). See, e.g., *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593; *Tressler v. Commissioner*, 228 F. 2d 356, 362 (C.A. 9th);

---

<sup>9</sup> Accordingly, the District Court sustained taxpayer’s objections to the Government’s attempts to introduce evidence as to the true nature of the transaction. (II-R. 99, 104, 177.)



*O. H. Kruse Grain & Milling v. Commissioner*, 279 F. 2d 123, 125 (C.A. 9th); *Wilbur Security Co. v. Commissioner*, 279 F. 2d 657, 661 (C.A. 9th). Since the District Court misunderstood the nature of the inquiry and applied a wholly incorrect standard its decision cannot stand. Cf. *United States v. Inter-mountain Furniture Mfg. Co.*, 363 F. 2d 554 (C.A. 10th); *Municipal Bond Corp. v. Commissioner*, 341 F. 2d 683, 690-691 (C.A. 8th).

**B. *The "debentures" in reality constituted part of the capital investment in taxpayer***

There is no doubt that an investor may simultaneously occupy the dual status of stockholder and creditor in relation to a corporation. One who, as a stockholder, has made a capital investment in the corporation in order to obtain a share of its profits may also make an advance of additional funds to it that constitutes "indebtedness" for tax purposes. In order for the stockholder's advance to constitute such indebtedness, however, it must create a true debtor-creditor relationship between the corporation and the stockholder. Where, as in the instant case, the stockholders' advances are in proportion to their stockholdings the use of a conventional debt-type instrument is not indicative of the true nature of the advances; since the stockholders are already in full control of the corporation there is no reason to include in the instrument (even if it in reality represents a capital investment rather than indebtedness) the control provision ordinarily found in an equity instrument.

Looking to the substance of the transaction wherein the partnership assets were transferred to taxpayer it is apparent that taxpayer's issuance of the "debentures" to its stockholders did not create a true debtor-creditor relationship between them, but only evidenced an additional part of the stockholders' capital investment in the corporation. Upon taxpayer's organization it received from Hayman and Driskel in the form of a capital investment \$9,000 of the partnership assets that it required in its business.<sup>10</sup> (I-R. 122.) The other \$64,000 of essential assets were transferred to taxpayer by Hayman and Driskel in exchange for the "debentures". (I-R. 122-123.) In addition, Hayman and Driskel obtained \$40,000 of bank credit for taxpayer by personally executing a continuing guarantee on its behalf.<sup>11</sup> (II-R. 108-109.) The "debentures" that Hayman and Driskel received from taxpayer, which were payable in 20 years, did not provide for any of the protective pro-

---

<sup>10</sup> The remainder of their formal capital investment in taxpayer consisted of goodwill which they valued at \$14,000.

<sup>11</sup> Since the bank also required Mrs. Hayman to execute the guarantee (II-R. 109) the bank apparently was not employing the guarantee merely as a means of preventing Hayman and Driskel from disposing of their interests in the corporation but was also looking to these individuals' personal credit to support its loans to taxpayer.

The effect of this guarantee was the same as if Hayman and Driskel had subordinated their claims with respect to the "debentures" to taxpayer's obligations to the bank. In the event taxpayer failed, Hayman and Driskel would have had to use funds that they received with respect to the "debentures" to satisfy taxpayer's obligations to the bank.

visions that an arms-length creditor making a long-term loan will demand.

The essential difference between a creditor and a stockholder is that the latter intends to embark upon the corporate adventure, taking the risks of loss contingent upon it so that he may enjoy the chances of profit. The creditor on the other hand, does not intend to take such risks so far as they may be avoided. *Helvering v. Richmond, F. & P. R. Co.*, 90 F. 2d 971, 974 (C.A. 4th); *Commissioner v. Meridian & Thirteenth R. Co.*, 132 F. 2d 182, 186 (C.A. 3d). This willingness to subject his investment to the risks of the enterprise in return for a part of its profits is the hallmark of the stockholder and is what distinguishes him from the creditor. Since the creditor seeks to avoid subjecting his funds to the risks of the business, before he will make a loan he requires some security for its repayment. If the loan is a short-term one, he may be content to rely on his right to share with the other creditors in the assets of the corporation in the event the business fails. Where a long-term loan is involved the creditor will not be satisfied to have to depend on this right alone, for he realizes that large portions of the corporation's assets may be dissipated by the payment of dividends and that his security in its assets may be diluted by its incurring large amounts of additional indebtedness, especially if that indebtedness is secured by liens on its assets. In order to minimize his risks the long-term creditor will demand that the instrument evidencing his loan contain at least some protective



provisions, e.g., liens on assets, restrictions on dividends, restrictions on the incurring of additional liabilities and on the mortgaging of assets, and provisions for a retirement sinking fund.<sup>12</sup>

The 20-year “debentures”, containing no such provisions clearly failed (II-R. 176-177, 179-180), as the District Court recognized (II-R. 186), to comply with the arm’s-length standards that would be demanded by anyone other than a person who, like Hayman and Driskel, held stock in proportion to the “debentures”. No one but a stockholder would advance funds to the corporation on the basis of such an instrument.

Moreover, the return that the stockholders were to receive through the “debentures” for the long-term commitment of their assets to the risks of the business was not the return of a creditor, i.e., a fixed amount that compensates for the risks incurred in making the advance, but rather, the return of one making a capital investment, i.e., a sharing in taxpayer’s future profits. It is apparent, as Bruce Ricks, the Government’s expert witness testified (II-R. 181, 182), that the 4 percent “interest” rate stated in the “debentures”<sup>13</sup> was not an adequate rate of re-

---

<sup>12</sup> See 1 Dewing, *Financial Policy of Corporations* (5th ed.), pp. 228-230. An example of such protective provisions may be found in *Kelly v. Central Hanover Bank & Trust Co.*, 11 F. Supp. 497, 502, fns. 2 and 3 (S.D. N.Y.), reversed and remanded on procedural grounds, 85 F. 2d 61 (C.A. 2d).

<sup>13</sup> William Hannam, one of taxpayer’s directors and officers, testified (II-R. 34-35) that this rate “was slightly in excess of what savings and loans were paying at that time on deposits.”

turn for an unsecured 20-year obligation, not covered by any protective provisions, of a relatively new business whose invested capital, which included \$14,000 assigned to goodwill, was only \$22,739. Certainly, the rate of return that would be demanded by an outsider would be substantially in excess of the rate that savings and loan associations were then paying on their deposits, which are normally insured by an instrumentality of the Federal Government.<sup>14</sup> The “debentures” also provided for payment of a “redemption premium” of 2 percent of the face amount of the “debentures” that would be redeemed prior to the expiration of 20 years, times the number of years by which redemption would be accelerated—which could be as many as 18 years. The amount of the “redemption premium”, which could have been as high as 36 percent (the “premium” actually paid was 32 percent (I-R. 217)), was greatly in excess of the 3 to 5 percent or one year’s interest on the principal amount being repaid that is normally provided for a redemption premium (see Winn and Hess, *The Value of the Call Privilege*, 14 *Journal of Finance*, 182, 187 (1959); II-R. 178).<sup>15</sup> Thus, the payments that

---

<sup>14</sup> National Housing Act, c. 847, 48 Stat. 1246, Sec. 403 (12 U.S.C. 1964 ed., Sec. 1726).

<sup>15</sup> Mr. Hayman, one of taxpayer’s two stockholders, suggested in his testimony (II-R. 83-85) that this extraordinarily large “redemption premium” gave the “debentures” marketability. It is clear, however, that an acceleration provision with a high redemption premium does not increase marketability, especially where the basic rate of return provided for in the instrument is inadequate. The function of a true re-



taxpayer's stockholders would receive under these two non-standard provisions of the "debentures" would bear no relation to the risk incurred in making the investment evidenced by these instruments, but would depend on the amount of taxpayer's earnings and on how much of these earnings the stockholders desired to withdraw. The nature of the return that taxpayer's stockholders were to receive, and in fact did receive, with respect to the "debentures" further emphasizes that in reality these instruments represented part of the capital investment in taxpayer's business. The District Court's conclusion that the "debentures" constituted indebtedness within the meaning of Section 163(a) was clearly wrong. Since no one who was not a stockholder would have made the advances to the corporation that were evidenced by the "debentures" and since the "debentures" permitted the stockholders, to whom they were issued, to withdraw part of the corporation's accumulated earnings, to regard the "debentures" as creating indebtedness within the meaning of the statute was to subvert substance to mere form. See *Nassau Lens Co. v. Commissioner*, 308 F. 2d 39, 46 (C.A. 2d); *Wilbur Security Co. v. Commissioner*, *supra*, 279 F.

---

demption premium is to compensate the investor for the costs of reinvestment and the possible loss of income that would result if a lower level of interest rates prevailed at the time of reinvestment. (See Winn and Hess, *supra*, p. 187.) An investment premium does not in any way compensate for an inadequate basic rate of return, since it does not increase the investor's security position and since it is payable only if the corporation elects to accelerate the redemption.

2d, p. 662; *Affiliated Research, Inc. v. United States*, 351 F. 2d 646, 649-650 (Ct. Cl.); *O. H. Kruse Grain & Milling v. Commissioner*, *supra*, 279 F. 2d, p. 126; *Gilbert v. Commissioner*, 248 F. 2d 399, 407 (C.A. 2d), on appeal from remand, 262 F. 2d 512 (C.A. 2d), certiorari denied, 359 U.S. 1002.

**C. In any event, the "redemption premium" payments were not deductible**

Regardless of the nature of the "debentures", the "redemption premiums" paid with respect to them were not deductible.<sup>16</sup> Where, as in the instant case, the payments are made to controlling stockholders it is necessary to scrutinize the transaction to make certain that the payments are reasonable in amount, since the transaction is not at arm's-length. *Baltimore Steam Packet Co. v. United States*, 180 F. Supp. 347, 350 (Ct. Cl.). The District Court failed to do this.<sup>17</sup> Although taxpayer made no such showing the court allowed the deductions that it sought with respect to these payments. Scrutiny of the transaction

---

<sup>16</sup> Under our contention that the "debentures" in reality represented a capital investment, the "redemption premium" payments constituted payments with respect to stock (1954 Code, Section 312(a)), which are not deductible. This portion of the argument, however, assumes, *arguendo*, that the "debentures" constituted indebtedness for tax purposes.

<sup>17</sup> The fact that the District Court, upon finding that the "debentures" constituted indebtedness within the meaning of Section 163(a), held (I-R. 196) that "JUDGMENT SHALL, THEREFORE, BE for the plaintiff [taxpayer], as prayed", shows that the court allowed the claimed deductions to taxpayer without considering the question of whether the "redemption premium" payments qualified for deductions.

would have shown clearly that the payments did not qualify for deductions.

The "redemption premium" payments that were made to taxpayer's stockholders were not reasonable in amount, but, as we have shown, were many times greater than what is normally paid as a redemption premium. That these payments were in reality distributions of earnings to taxpayer's stockholders is illustrated by a simple analysis of the cost incurred by the corporation on the early redemption of the "debentures" as compared to the cost of paying the annual "interest". The net cost to taxpayer of retaining the funds that it used to redeem the "debentures" would have been a mere 2 percent per annum. In 1957 and 1958, when the redemptions took place (I-R. 125), United States Government bonds (the safest possible investment) were yielding a return of at least 3 percent. See N. Y. Times, June 1, 1957, p. 24, cols. 7 and 8, April 17, 1958, p. 51, cols. 7 and 8. Obviously, it would have been to taxpayer's corporate advantage to have retained these funds for the possible future needs of its business and to receive income therefrom, rather than hastening to redeem the "debentures" merely because corporate earnings were high. (II-R. 36-37, 92-93.) Under the circumstances the payment of the "redemption premiums" was extraordinary and unnecessary and would not even qualify as a business expense under Section 162(a) of the 1954 Code, *supra*, let alone as interest.

## CONCLUSION

The District Court's decision allowing taxpayer the deductions that it sought is based on incorrect standards and is clearly erroneous. The judgment below should be reversed and this case remanded to the District Court with instructions to enter judgment for the United States.

Respectfully submitted,

MITCHELL ROGOVIN,  
*Assistant Attorney General,*

LEE A. JACKSON,  
HAROLD C. WILKENFELD,  
SOLOMON L. WARHAFTIG,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530*

*Of Counsel:*

JOHN VAN DE KAMP,  
*United States Attorney.*

CHARLES H. MAGNUSON,  
*Assistant United States Attorney.*

January, 1967.

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ----- day of January, 1967.

-----  
Attorney



## APPENDIX

## EXHIBITS

	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Plaintiff's Exhibits 1 through 28 (described at I-R. 129-131)	II-R. 23	II-R. 23	II-R. 25
Plaintiff's Exhibit 29	II-R. 88-89	II-R. 90	II-R. 90
Defendant's Exhibit A	II-R. 109	II-R. 128	II-R. 128

No. 21104

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA, APPELLANT

v.

HASKEL ENGINEERING & SUPPLY CO., APPELLEE

---

BRIEF FOR THE APPELLEE

---

GOODSON AND HANNAM  
WALTER S. WEISS  
RICHARD W. CRAIGO

Counsel for Appellee

6380 Wilshire Boulevard  
Los Angeles, California 90048

MAR 20 1967

FILED

MAR 16 1967

WM. B. LUCK, CLERK



No. 21104

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA, APPELLANT

v.

HASKEL ENGINEERING & SUPPLY CO., APPELLEE

---

BRIEF FOR THE APPELLEE

---

GOODSON AND HANNAM  
WALTER S. WEISS  
RICHARD W. CRAIGO

Counsel for Appellee

6380 Wilshire Boulevard  
Los Angeles, California 90048





I N D E X

Page

Questions Presented. . . . .	1
Statutes and Regulations Involved. . . . .	2
Statement of the Case. . . . .	2
Debenture Bond Issue. . . . .	2
Reserve for Bad Debts Issue . . . . .	7
Summary of Argument. . . . .	8
The Interest and Redemption Premium Payments. . . . .	9
The Additions to Appellee's Bad Debt Reserve. . . . .	12
Argument . . . . .	
I. The District Court Correctly Determined That Appellee Was Entitled to Deductions In the Years Involved for the Interest And Redemption Premium Payments Made With Respect To Its Series A Four Percent Registered Debenture Bonds. . . . .	13
A. The Debenture Bonds Constituted Indebtedness Within the Meaning of the Internal Revenue Code. . . . .	13
B. The Redemption Premium Payments were Deductible . . . . .	29
C. The District Court Applied the Correct Standards . . . . .	33
II. The District Court Correctly Determined That Appellee Had Properly Computed And Claimed As Deductions Its Annual Additions To Its Reserve for Bad Debts. . . . .	34
Conclusion . . . . .	42



## CITATIONS

### Page

#### Cases:

Affiliated Research, Inc. v. United States, 351 F.2d 646 . . . . .	28
Art Metal Const. Co. v. United States, 17 F. Supp. 854 . . . . .	39, 40
Calavo, Inc. v. Commissioner, 304, F.2d 650 . . . . .	37
Chesapeake & Ohio Ry. Co. v. Martin, 283, U.S. 209. . . . .	16
Commissioner v. Belridge Oil Co., 297 F.2d 345 . . . . .	32
Commissioner v. Laughton, 113 F.2d 103 . . . . .	14
Doric Co. v. Commissioner, 341 F.2d 967 . . . . .	32
Earle v. W. J. Jones & Son, Inc., 200 F.2d 846 . . . . .	15, 22
Estate of Powel Crosley, Jr., 47 T.C. ___, No. 29. . . . .	26
General Utilities & Operating Co. v. Helfering, 296 U.S. 200. . . . .	32, 33
Kraft Foods Co. v. Commissioner, 232 F.2d 118 . . . . .	21
Los Angeles Shipbuilding & Drydock Corp. v. United States, 289 F.2d 222 . . . . .	15, 19
Maloney v. Spencer, 172 F.2d 638 . . . . .	15
Miller's Estate v. Commissioner, 239 F.2d 729 . . . . .	22
Nassau Lens Co. v. Commissioner, 308 F.2d 39 . . . . .	15, 25, 27



Nicholas v. Davis, 204 F.2d 200 . . . . .	16
O. H. Kruse Grain and Milling v. Commissioner, 279 F.2d 123 . . . . .	15, 16, 28
P. M. Finance v. Commissioner, 302 F.2d 786 . . . . .	18
Petersen, Albert W., T.C. Memo 1965-145 . . . . .	19
Roberts v. Porter, Ins. v. Commissioner, 307 F.2d 745 . . . . .	30
Rowan v. United States, 219 F.2d 51 . . . . .	20
Samson Tire v. Rogan, 136 F.2d 345 . . . . .	14
San Joaquin Light & Power Corp. v. McLaughlin, 65 F.2d 677. . . . .	30
Taft v. Commissioner, 314 F.2d 620 . . . . .	14, 15, 27
Vantress, Charles D., T.C. Memo. 1964-123. . . . .	21
Wilbur Security Co. v. Commissioner, 279 F.2d 657 . . . . .	14, 15, 16
Wilshire and Western Sandwiches, Inc. v. Commissioner, 175 F.2d 718 . . . . .	15

**Statutes:**

Internal Revenue Code of 1954:	
Sec. 162 (26 U.S.C. 1964 ed., Sec. 162). . . . .	29, 30, 32
Sec. 163 (26 U.S.C. 1964 ed., Sec. 1963) . . . . .	14, 31
Sec. 166 (26 U.S.C. 1964 ed., Sec. 166) . . . . .	35, 41





Miscellaneous:

Caplin, The Caloric Count of the Thin Incorporation, N.Y.U. 17th Inst. on Fed. Tax, 771 (1959). . . . .	22
Federal Reserve Bulletin, December 1953, at 1336, 1357 . . . . .	24
Revenue Ruling 57-198, 1957-1 C.B. 94 . . .	30
Treasury Regulations on Income Tax (1954 Code), Sec. 1.61-12(c) (26 C.F.R., Sec. 1.61-12(c)) . . . . .	2, 30
Treasury Regulations on Income Tax (1954 Code), Sec. 1.166-4(26 C.F.R., Sec. 1.166-4). . . . .	35
59th Annual Report of Building & Loan Commissioner, State of California 18 (1952). . . . .	24



1 IN THE UNITED STATES COURT OF APPEALS  
2 FOR THE NINTH CIRCUIT

---

3 No. 21104

4 UNITED STATES OF AMERICA, APPELLANT

5 v.

6 HASKEL ENGINEERING & SUPPLY CO., APPELLEE

---

7  
8 On Appeal From the Judgment of the United States  
9 District Court for the Southern (Now Central)  
0 District of California

---

1 BRIEF FOR THE APPELLEE

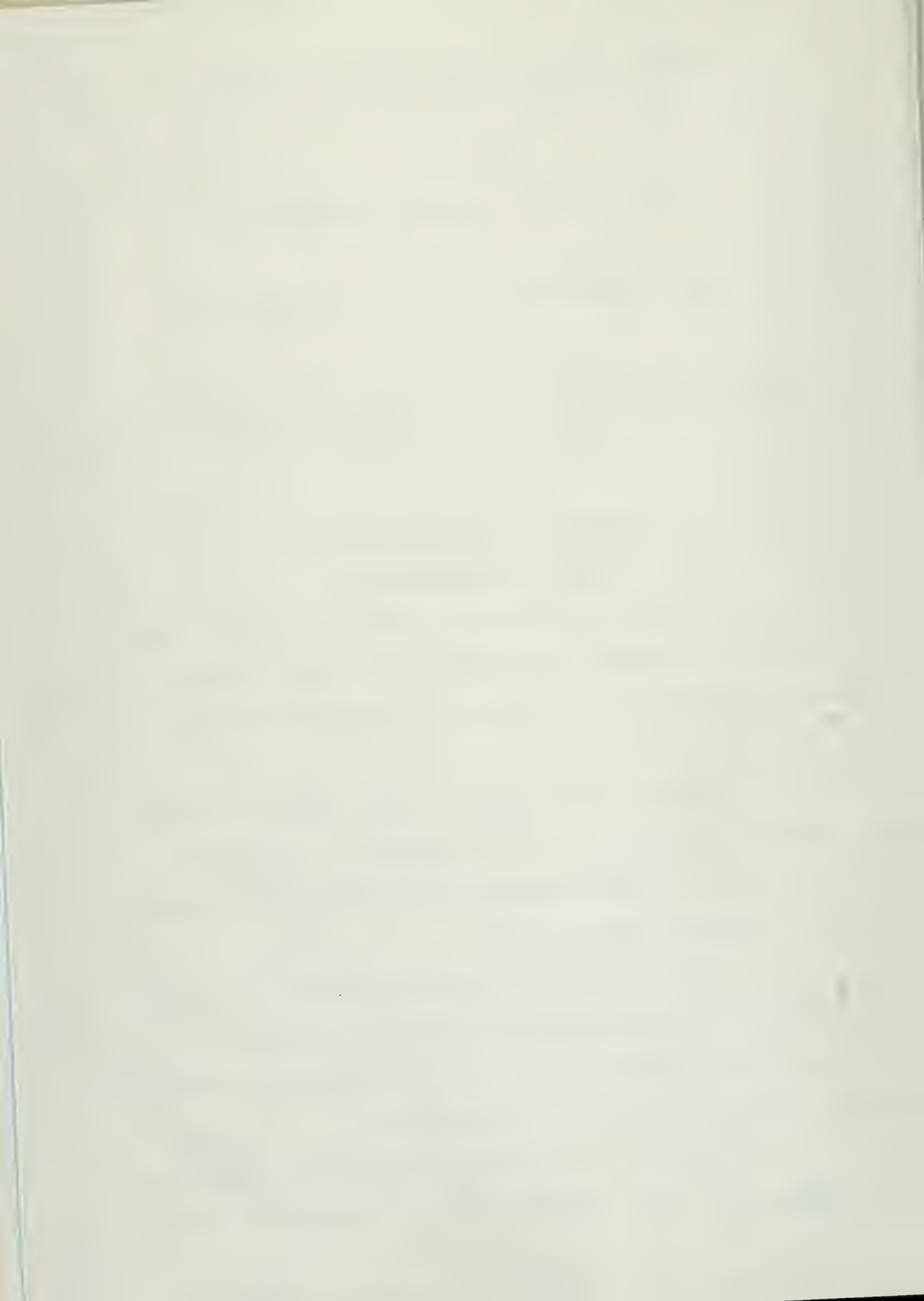
2 QUESTIONS PRESENTED

3 1. Whether the District Court erred in finding  
4 that appellee's Series A Debenture Bonds were evidences of  
5 indebtedness within the meaning of the Internal Revenue  
6 Code.

7 2. Whether the District Court erred in finding  
8 that interest payments made with respect to appellee's  
9 Series A Debenture Bonds constituted a deductible expense  
0 under the Internal Revenue Code.

1 3. Whether the District Court erred in finding  
2 that redemption premium payments made with respect to  
3 appellee's Series A Debenture Bonds constituted a deductible  
4 expense under the Internal Revenue Code.

5 4. Whether the District Court erred in finding  
6 that appellee's annual additions to its bad debt reserves





1 were reasonable and therefore deductible under the Internal  
2 Revenue Code.

### 3 STATUTES AND REGULATIONS INVOLVED

4 In addition to the Statutes and Regulations set  
5 forth in appellant's brief, the following Regulation is  
6 involved:

7 Treasury Regulation on Income Tax (1954 Code):

8 Sec. 1.61-12(c) Sale and purchase by corporation  
9 of its bonds.

10 "(1) If bonds are issued by a corporation at  
11 their face value, the corporation realizes no gain or loss.  
12 If the corporation purchases any of such bonds at a price  
13 in excess of the issuing price or face value, the excess  
14 of the purchase price over the issuing price or face value  
15 is a deductible expense for the taxable year. . ."

### 16 STATEMENT OF THE CASE

#### 17 Debenture Bond Issue

18 In June, 1952, appellee, HASKEL ENGINEERING &  
19 SUPPLY CO., was duly incorporated under the laws of the  
20 State of California to engage in the design, development  
21 and sale of hydraulic parts and equipment. At the same  
22 time, HASKEL ENGINEERING & SUPPLY CO., a partnership  
23 comprised of Richard L. Hayman and Donald W. Driskel,  
24 made a bona fide offer to transfer to appellee solely in  
25 exchange for 1500 shares of appellee's no par value voting  
26 common stock, the following partnership assets having the



1	following values:	<u>Value</u>	
2	Leasehold Improvements	\$ 3,377.38	
3	Furniture and Fixtures	699.54	
4	Equipment	1,757.08	
5	Automobiles	1,187.04	
6	Good Will	14,000.00	
7	Prepaid Rent	1,360.00	
8	Prepaid Insurance	195.47	
9	Prepaid Office Expenses	164.50	
10	Deposits	<u>27.75</u>	
11	TOTAL	<u>\$22,738.76</u>	(I-R.214,Exh.10) <sup>1</sup>

12           The good will referred to above included (1)  
13 customer lists and accounts; (2) substantial unfilled  
14 orders; (3) the name "HASKEL ENGINEERING & SUPPLY CO."; <sup>1</sup>  
15 and (4) "going concern value" as represented by an  
16 established, integrated, profitable business structure  
17 with organized plant facilities and experienced personnel.  
18 (I-R. 214-215)

19           At the same time, said partnership made a  
20 further bona fide offer to transfer to appellee, solely in  
21 exchange for \$64,000.00 of Series A Registered Debenture

22           <sup>1</sup> "I-R." and "II-R." references are to Volumes I and  
23 II of the record on appeal. "Tr." references are to the  
24 reporter's transcript of the January 24, 1966 proceedings  
25 in the Court below. "Br." references are to the appellant's  
26 brief. "Exh." refers to exhibit admitted in evidence.



Bonds of appellee, the following partnership assets having the following value:

	<u>Value</u>	
Inventories	\$30,595.55	
Accounts Receivable	28,232.24	
Furniture and Fixtures	<u>5,172.21</u>	
TOTAL	<u>\$64,000.00</u>	(I-R. 125, Exh. 9)

The Board of Directors of appellee, by appropriate resolution, accepted the aforementioned offers of HASKEL ENGINEERING & SUPPLY CO. partnership. (Exh. 8) An application was duly filed with the Commissioner of Corporations of the State of California for a permit authorizing appellee to sell and issue the aforesaid capital stock and Debenture Bonds. (Exh.11) In August, 1952, a permit for such issuance was duly granted by the Commissioner of Corporations. (Exh. 12) Thereupon, in accordance with said permit, appellee issued the capital stock and Debenture Bonds in exchange for the assets set forth above. (I-R. 215) Each Debenture Bond was in the face amount of \$1,000.00 and provided for: (1) A fixed maturity date of June 4, 1972; (2) Interest at the rate of four (4%) percent per annum payable until maturity; (3) Acceleration of the indebtedness upon default; (4) A redemption premium of two (2%) percent of the face amount for each year that maturity was accelerated, such redemption to occur only after June 5, 1954. (I-R. 216, Exh. 13)

With regard to the terms of said Debenture Bonds,





1 it was the unequivocal intention of both appellee and the  
2 bondholders that a true debtor-creditor relationship be  
3 established. The bondholders were unwilling to subject  
4 all of their investment in appellee to the permanent risk  
5 of appellee's business. (II-R. 79-80) Accordingly,  
6 they concluded that a portion of their total investment  
7 should be represented by debt instruments enabling them  
8 to share with other creditors in the event appellee  
9 encountered future financial difficulties. Furthermore,  
0 the bondholders desired to protect their respective heirs  
1 by assuring said heirs a fixed flow of income in the event  
2 of their untimely deaths. (II-R. 80) The redemption  
3 premium payment feature was intended to protect the heirs  
4 of the bondholders by increasing the marketability of the  
5 bonds. (II-R. 83-85)

6 During each of the years 1952 through 1958,  
7 appellee regularly paid to the holders of the Debenture  
8 Bonds four (4%) percent interest on the face amount  
9 thereof. (This amount was in excess of the rate then  
0 being paid by California savings and loan associations).  
1 No interest payments were ever omitted during these years  
2 and the amounts paid were always exactly as required by  
3 the terms of said Debenture Bonds. The interest payments  
4 were in no way contingent upon earnings of appellee.  
5 Debenture Bonds were never subordinated to any other  
6 debts of appellee at any time. Debenture Bonds were



1 always clearly reflected on appellee's books, records and  
2 financial statements and in Dun and Bradstreet credit  
3 reports, as outstanding long-term indebtedness. (I-R.  
4 216-217, II-R. 88-89, Exh. 29)

5 As a result of unexpected and substantial  
6 business profits, appellee was in a favorable cash position  
7 during its taxable year 1957. Since the large long-term  
8 debt being carried on its financial statements had caused  
9 some concern among its customers in the past, (II-R 88-92)  
10 appellee's Board of Directors decided to redeem approxi-  
11 mately one-half of the Debenture Bonds outstanding. This  
12 decision was also based upon their determination that such  
13 redemption would reduce future interest payments and would  
14 result in a tax deduction during a high-profit period.  
15 (II-R. 92) Accordingly, the redemption was effected.  
16 In appellee's taxable year 1958, the Board of Directors,  
17 for essentially the same reasons, effected a redemption of  
18 the remaining Debenture Bonds. (I-R. 217)

19 During the taxable years 1957 and 1958,  
20 interest payments were made by appellee with  
21 respect to its Debenture Bonds in the amounts  
22 of \$2,599.92 and \$2,053.26, respectively. During  
23 the taxable years 1957 and 1958 appellee made  
24 redemption premium payments in the amounts  
25 of \$9,600.00 and \$10,500.00, respectively. On its  
26 tax returns for these taxable years, appellee duly claimed





1 deductions for these payments. (I-R. 125) The  
2 Commissioner determined deficiencies based upon a dis-  
3 allowance of all of the interest and redemption premium  
4 payments. (I-R. 127)

5 The District Court found that the Debenture  
6 Bonds were precisely what they purported to be - evidences  
7 of indebtedness within the meaning of the Internal Revenue  
8 Code - and allowed appellee's claimed deductions. (I-R. 219)

9 Reserve for Bad Debts Issue

0 Since its inception, appellee employed the  
1 reserve method of accounting for bad debts. (II-R. 217-218)  
2 At the end of each of the taxable years 1958 and 1959,  
3 appellee segregated and listed all accounts receivable  
4 by age and then undertook a detailed review of all  
5 delinquent accounts with appellee's credit manager, con-  
6 sidering both past history and future probability of  
7 anticipated losses. (II-R. 37-39, 93-96) On the basis  
8 of this extensive review, appellee determined a reasonable  
9 annual addition to its bad debt reserve. In each year  
0 involved the reserve, after allowance for bad debts  
1 incurred during the taxable year, amounted to approximately  
2 two (2%) percent of appellee's total accounts receivable.  
3 Among the facts at the end of each year which were  
4 considered was the fact that smaller accounts were being  
5 added, thus increasing the probability that increased  
6 losses would be incurred. (II-R. 37-42) This method of



annual review of accounts receivable was found by the District Court to be in accordance with sound business judgment and accepted accounting principles. (I-R. 218) Deductions for the additions to the reserve were duly claimed for each of the taxable years.

The Commissioner determined that reasonable additions to appellee's bad debt reserves for the years in question should have been determined solely from a simple mathematical calculation based upon appellee's past history of losses even though its total accounts receivable had risen from approximately \$32,000.00 to \$321,000.00. On the basis of this calculation, the Commissioner determined that no additions should have been made for 1958, (in lieu of appellee's addition of \$3,130.80) and that \$917.25 was a proper addition for 1959 (in lieu of appellee's addition of \$1,800.00). (I-R 126-127)

The District Court found that appellee having used sound business methods and standard accounting practices, had established that its additions to bad debt reserve was reasonable. (I-R. 218)

#### SUMMARY OF ARGUMENT

The questions on appeal concern the propriety of the District Court's findings and conclusions with regard to certain deductions taken by appellee in connection with interest and redemption premium payments





made with respect to its Registered Debenture Bonds during taxable years 1957 and 1958, and in connection with additions to its bad debt reserves during taxable years 1958 and 1959. Appellant insists that the District Court applied incorrect standards in considering both of these questions and that its conclusions were clearly erroneous. Appellee submits that the District Court's findings of fact were supported by substantial and overwhelming evidence and that the District Court applied correct standards in concluding that appellee was entitled to each of its claimed deductions.

#### The Interest and Redemption Premium Payments

The primary question is whether appellee's Debenture Bonds constituted "indebtedness" within the meaning of the Internal Revenue Code, or whether they should rather be considered as part of the shareholders' capital investments in appellee.

In determining this question, the courts have looked first to whether the evidences of indebtedness are enforceable under local law. The courts then look to a wide array of factual criteria to determine whether such debt should be treated as indebtedness for purposes of taxation. The District Court here found not only that the Debenture Bonds constituted valid indebtedness for purposes of local law, a finding unchallenged by appellant, but thereafter made specific findings of fact that the Debenture Bonds satisfied





1 almost every single criterion used by the courts. On this  
2 basis, the District Court concluded that as a matter of  
3 law, the Debenture Bonds constituted indebtedness within  
4 the meaning of the Internal Revenue Code.

5       Among the findings and uncontroverted testimony  
6 upon which the District Court's findings were based  
7 were the facts that (1) the Debenture Bonds had a fixed  
8 maturity date; (2) they contained an unconditional promise  
9 to pay in all events which was in no way dependent upon  
10 or was related to the earnings of appellee; (3) upon  
11 default the entire principal amount of the Debenture  
12 Bonds was due and payable; (4) there were no provisions  
13 for any participation by the bondholders in the manage-  
14 ment of appellee; (5) the Debenture Bonds were never  
15 subordinated to the claims of other creditors; (6)  
16 it was the intention of the parties to create a debtor-  
17 creditor relationship; (7) the Debenture Bonds were  
18 always clearly reflected on appellee's books, records  
19 and financial statements as long-term debt; (8) appellee  
20 was adequately capitalized, i.e., there was no "thin"  
21 capitalization; and (9) payments of interest were always  
22 timely made and no such payments were ever omitted.  
23 The courts have held almost universally that satisfying  
24 these criteria qualifies the debt as an "indebtedness"  
25 for purposes of the Internal Revenue Code.

26       In opposition to this evidence, appellant



1 argues that the Debenture Bonds were not debt for  
2 tax purposes since appellant contends the Debenture Bonds  
3 were not marketable in the sense that a hypothetical third  
4 party would not have invested in them. Appellant's  
5 entire argument is in the form of a philosophical dis-  
6 cussion totally lacking in recognized precedent and  
7 authorities which ignores all other relevant criteria  
8 (especially the criteria of intent and adequate capitali-  
9 zation) and places all-pervasive importance on claimed  
10 lack of marketability, which appellant fails to establish.  
11 In view of the overwhelming factual proofs, appellee sub-  
12 mits that the findings of the District Court were not  
13 clearly erroneous and that Debenture Bonds constituted valid  
14 indebtedness within the meaning of the Internal Revenue Code.

15 Appellant raises improperly for the first time on  
16 appeal, an issue that even if the bonds constitute  
17 indebtedness for federal tax purposes, payments of the  
18 redemption premiums thereon are not deductible as  
19 either interest or business expenses. Appellant cites  
20 no authority for this proposition. Since the  
21 redemption premiums were regularly made on valid debt  
22 instruments they are clearly deductible.

23 Finally, appellant uses questionable candor in  
24 claiming that the District Court erred in its application  
25 of a legal standard. Appellant claims that the District  
26 Court merely found that the debt was enforceable under





1 state law and that since there was no showing of "fraud"  
2 against the United States, that appellee should prevail.  
3 The record clearly establishes that the Court did apply  
4 the proper standards.

5 The Additions to Appellee's Bad Debt Reserve

6 The amounts in question here are de minimus.  
7 Appellee made additions to its bad debt reserve raising  
8 its total reserve to approximately two (2%) percent of  
9 total accounts' receivable. Although minimal, the  
0 additions were made in accordance with a meticulous,  
1 thorough and acceptable business and accounting procedure,  
2 whereby all accounts were listed and segregated by age  
3 and individually reviewed as to collectable status  
4 based upon both past history and future probability and  
5 the changing nature of appellee's customers.

6 Appellant did not refute any of this testimony.  
7 but contends that the application of a simple inflexible  
8 mathematical formula based solely upon past history is  
9 the exercise of sound discretion.

0 Appellant argues that this simple mathematical  
1 determination is not subject to attack. Appellee, on  
2 the other hand, contends that the Commissioner not only  
3 abused its discretion but employed no discretion whatever.

4 - - - - -  
5  
6



1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6

---

---

---

The District Court Correctly Determined That Appellee Was Entitled To Deductions In The Years Involved For The Interest And Redemption Premium Payments Made With Respect To Its Series A Four Percent Registered Debenture Bonds.

Appellee claimed deductions for payments of interest on its Debenture Bonds in the amounts of \$2,599.92 and \$2,053.26, respectively, and for payments of redemption premiums on its Debenture Bonds in the amounts of \$9,600.00 and \$10,500.00, respectively, for its taxable years 1957 and 1958. The District Court concluded that the Debenture Bonds were precisely what they purported to be and that appellee had properly claimed all of these deductions.

A. The Debenture Bonds Constituted Indebtedness  
Within the Meaning of the Internal Revenue Code.

The question on appeal is whether the District Court erred in holding that appellee was entitled to deductions for the payments to its bondholders with respect to its Debenture Bonds. Appellant contends that in substance the Debenture Bonds constituted part of the capital investment in appellee. Implicit in the determination of this issue is the extent to which the shareholders of a close corporation are free to allocate



2  
1 their investment between debt and equity. This is a  
2 question of fact and under familiar principles the  
3 findings of the Trial Court are conclusive unless clearly  
4 erroneous, the critical determination being whether there  
5 is any substantial evidence to support the conclusion  
6 reached by the trier of fact. Wilbur Security Co. v.  
7 Commissioner, 279 F.2d 657, 659 (9th Cir. 1960).<sup>3</sup>

8 Appellee submits that there is substantial  
9 evidence supporting the District Court's finding of fact  
10 and conclusion of law that appellee's Debenture Bonds were  
11 evidences of indebtedness within the meaning of section  
12 163(a) of the Internal Revenue Code. (I-R. 216, 219)

13 In approaching this factual determination, the  
14 Second Circuit Court of Appeals has stated that such is  
15 a two-step process; first, whether the evidence of  
16 indebtedness did, in fact, create a debt, and second, if so,

17  
18 <sup>2</sup>  
19 It has been well settled for many years that a  
20 closely held corporation possesses an independent tax status,  
21 and real transactions, even though designed to procure a tax  
22 advantage, will not be disregarded. Samson Tire v. Rogan,  
23 136 F.2d 345 (9th Cir. 1943); Commissioner v. Laughton, 113  
24 F.2d 103 (9th Cir. 1940).<sup>3</sup>

25 In Taft v. Commissioner, 314 F.2d 620, 622 (9th Cir.  
26 1963) it was stated that this might present a mixed  
question of law and fact.





1 should such debt be treated as "indebtedness" for  
2 purposes of federal taxation. Nassau Lens Co. v.  
3 Commissioner, 308 F.2d 39, 46 (2nd Cir. 1962).

4 Regarding the first question, it is clear  
5 that the Debenture Bonds created valid indebtedness  
6 for purposes of local law, having been duly authorized  
7 for issuance by the California Corporations Commissioner.  
8 (II-R. 215)<sup>4</sup> Appellant has not seriously disputed  
9 this fact.

10 On the second question, courts have looked  
11 to various factual criteria for the purpose of making a  
12 determination of whether the indebtedness should be  
13 treated as debt for purposes of federal taxation.  
14 See Taft v. Commissioner, supra; Los Angeles Shipbuilding  
15 & Drydock Corp. v. United States, 289 F.2d 222 (9th  
16 Cir. 1961); Wilbur Security Co. v. Commissioner, supra;  
17 O. H. Kruse Grain and Milling v. Commissioner, 279 F.2d 123  
18 (9th Cir. 1960); Earle v. W. J. Jones & Son, Inc.,  
19 200 F.2d 846 (9th Cir. 1952); Wilshire and Western  
20 Sandwiches, Inc. v. Commissioner, 175 F.2d 718 (9th Cir.  
21 1949); Maloney v. Spencer, 172 F. 2d 638 (9th Cir.

22  
23 <sup>4</sup>  
24 Even Mr. Ricks, a witness for appellant testified  
25 under cross-examination that in his opinion the holders of  
26 the Debenture Bonds were probably creditors for liquidation  
purposes. (I-R. 183)



1949).<sup>5</sup> A summary of these factors as they apply to the present situation is as follows:<sup>6</sup>

(1) The Names Given to the Certificates Evidencing the Indebtedness. The Debenture Bonds in question were designated as Series A Four Percent Registered Debenture Bonds. (I-R. 15; II-R. 32)

(2) The Presence or Absence of a Maturity Date. Each Debenture Bond had a fixed maturity date of June 4, 1972. (I-R. 15, 216; II-R. 32)

(3) The Source of the Payments. Each Debenture Bond contained an unconditional promise to pay in all events, which was in no way dependent upon or related to the earnings

---

<sup>5</sup>  
Wilbur Security Co. v. Commissioner, supra and O.H. Kruse Grain and Milling v. Commissioner, supra, each listed the eleven (11) criteria which are to be considered.

<sup>6</sup>  
In analyzing the evidence in this case, this Court should be mindful of the fact that appellee alone presented evidence establishing the existence of these criteria. The testimony of Messrs. Hayman and Hannam and the documents introduced by appellee were neither impeached nor controverted. Accordingly, even though Messrs. Hayman and Hannam were interested witnesses, their testimony may not be disregarded. See Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-220; Nicholas v. Davis, 204 F.2d 200 (10th Cir. 1953).





1 of appellee. (I-R. 15; II-R. 33, 83)

2 (4) The Right to Enforce the Payment of Principal  
3 and Interest. The Debenture Bonds provided that in the  
4 event of default in the payment of interest, the entire  
5 amount of the bond would become due and payable, which  
6 claim was enforceable in a court of law. (I-R. 15)

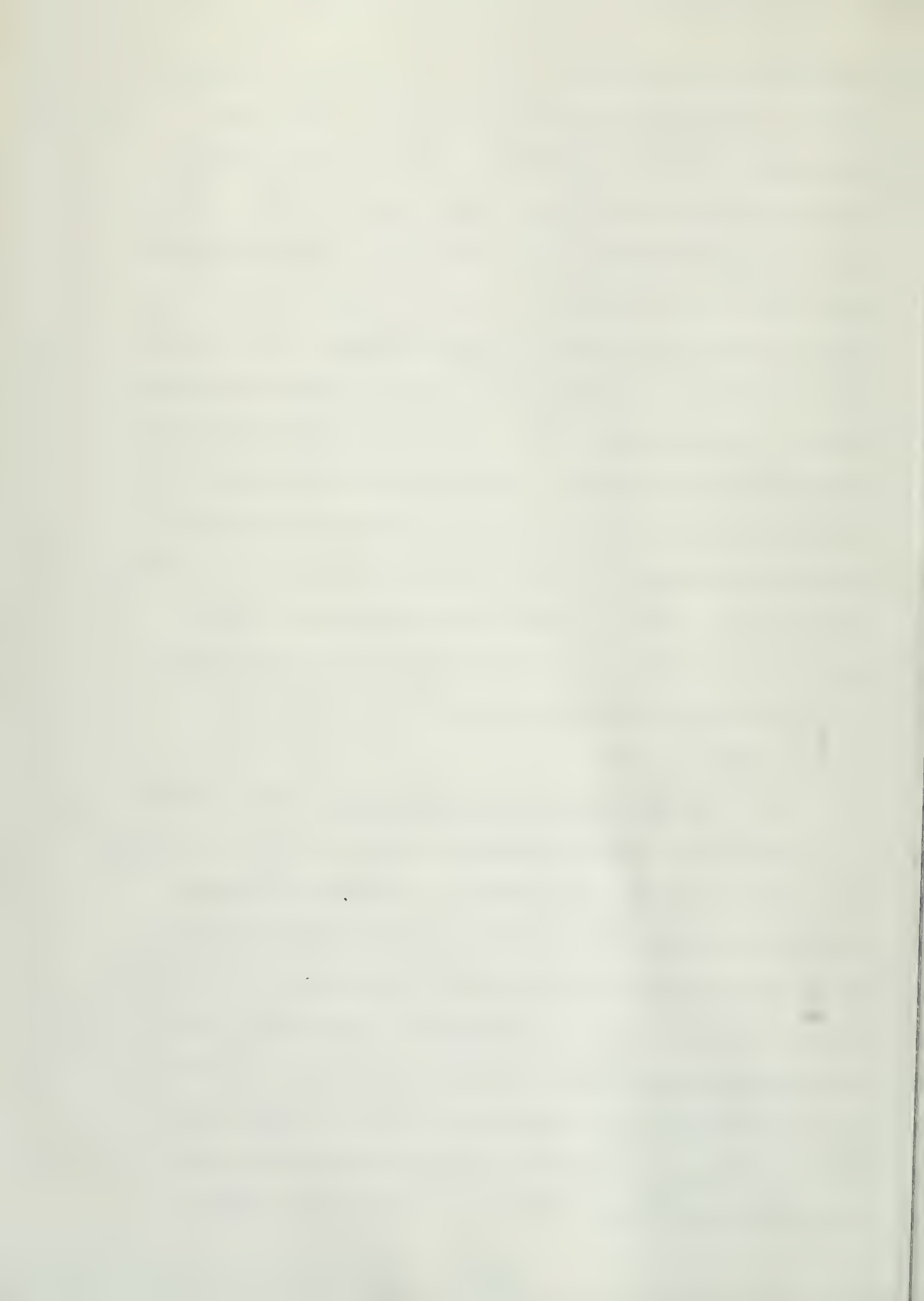
7 (5) Participation in Management. The Debenture  
8 Bonds did not provide for any voting rights or any  
9 participation by the bondholder in the management of  
10 appellee. (I-R. 15; II-R. 33-34)

11 (6) A Status Equal to or Inferior to that of  
12 Regular Corporate Creditors. The status of the bond-  
13 holders was equal to that of regular corporate creditors  
14 since the bonds were enforceable "debt" under the  
15 provisions of local law, having been duly authorized for  
16 issuance by the California Corporation Commissioner.  
17 (I-R. 215; II-R. 183) Nor were the Debenture Bonds ever  
18 subordinated. (I-R. 217; II-R. 83) Appellant attempts  
19 to contest the finding of fact that there was never a  
20 subordination since the bondholders executed a  
21 continuing guaranty for a \$40,000.00 line of bank credit  
22 for appellee. Appellant reasons that the effect of this  
23 guaranty was the same as subordination of the Debenture  
24 Bonds since if appellee had failed, the bondholders  
25 would have had to use funds which they received with  
26 respect to the Debenture Bonds to satisfy appellee's



1 obligations to the bank. (Br. 23, n. 11) Appellant  
2 cites no authority for this reasoning. There was  
3 absolutely no subordination of the Debenture Bonds to  
4 any of appellee's creditors including its bank. There  
5 were no restrictions on the repayment of the Debenture  
6 Bonds while any bank loans remained unpaid such as was  
7 the case in P.M. Finance v. Commissioner, 302 F.2d 786  
8 (3rd Cir. 1962), a case relied upon by appellant at the  
9 trial. The obtaining of a continuing guaranty from the  
10 shareholders of small or closely held corporations is  
11 a normal banking practice, a fact which appellant's  
12 own expert witness, Mr. Jewell, testified to under cross-  
13 examination. (II-R. 129) Under appellant's logic  
14 there could rarely be Debenture Bonds for tax purposes  
15 in any closely held corporation which at any time  
16 borrowed from a bank.

17 (7) The Intent of the Parties. The record  
18 is replete with uncontroverted evidence as to the intent  
19 of appellee and the bondholders to create a debtor-  
20 creditor relationship. Messrs. Hayman and Driskel were  
21 unwilling to subject all of their investment in appellee  
22 to the permanent risk of appellee's business. (II-R. 79-80)  
23 Accordingly, they concluded that a portion of their total  
24 investment should be represented by debt instruments  
25 enabling them to share with other creditors in the event  
26 appellee encountered future financial difficulties.



Furthermore, Messrs. Hayman and Driskel desired to protect their respective heirs by assuring said heirs a fixed flow of income in the event of their untimely deaths. (II-R. 80) This guaranteed flow of income could only be obtained by debt instruments with fixed rates of interest payable in all events. Such intent of the parties is further evidenced by the fact that the Debenture Bonds were always clearly reflected on appellee's books, records and financial statements (I-R. 217; II-R. 88), even though such reflection had an adverse effect on appellee's credit rating. (II-R. 90-92) The intent in including the redemption payment feature was to protect the heirs by increasing the marketability of the bonds. (II-R. 83-85)

Appellant has chosen to ignore the intent of the parties. In Los Angeles Shipbuilding & Drydock Corp. v. United States, supra, this court stated at p. 227:

"This Circuit [the Ninth] holds that the intention of the parties is a major factor in determining whether advances by stockholders to a corporation are loans or capital investments."

See also Albert W. Petersen, T.C. Memo 1965-145.

The only evidence in this case conclusively demonstrates that it was the unequivocal intention of the parties that a debtor-creditor relationship be





established. This manifest intent may not be cavalierly disregarded by appellant in its zeal to collect maximum tax revenues. As was stated by Judge Tuttle in Rowan v. United States, 219 F.2d 51 (5th Cir. 1955), at p. 54:

"Recognizing fully that the Government is not bound in its tax collecting activities by the terminology used by taxpayers if such terminology is actually used to disguise something quite different, we nevertheless have seen no authority for the proposition that the stockholders of a corporation may not determine just how much of their funds they care to risk in the form of capital and how much, if any, they are willing to lend as a creditor. If they make such a determination and it is clear that such is their intent,. . .this does not entitle the Commissioner of Internal Revenue to re-write their balance sheet for them and show to be capital what was intended to be a loan."

Judge Tuttle added, at p. 55:

". . .the Court also recognizes that, entirely without reference to the incidence of taxes, stockholders of corporations have always been free to commit to corporate



operations such capital as they choose and to lend such additional amounts as they may elect to assist in the operation if that is their true intent, always thus reserving the right to share with other creditors a distribution of assets if the enterprise fails."

(8) "Thin" or Adequate Capitalization.

Appellant apparently does not contend that there was a "thin" incorporation, except that in an oblique manner an attempt is made to ignore the substantial good will which was transferred to appellee. (Br. 23) The District Court found that good will, in fact, existed and included (1) customer lists and accounts; (2) substantial unfilled orders; (3) the name "HASKEL ENGINEERING & SUPPLY CO."; and (4) "going concern value"

---

No undue significance should be attached to the fact that income tax considerations were evaluated in the formulation and consummation of appellee's business judgment decision to issue the Debenture Bonds. Indeed, all well considered modern business decisions today involve and require such analysis. See for example, Kraft Foods Co. v. Commissioner, 232 F.2d 118 (2d Cir. 1956); Charles D. Vantress, T. C. Memo. 1964-123, and cases cited therein.





as represented by an established integrated, profitable business structure with organized plant facilities, equipment and experienced personnel. (I-R. 214-215) These findings are clearly supported by the evidence of Mr. Hannam (II-R. 13-15, 57-65), and Mr. Hayman (II-R. 81-82). There was even substantial evidence that using one of the government's own formulae, (A.R.M. 34), good will did exist in an amount substantially in excess of \$14,000.00. (II-R. 152-154) The fact that good will did not appear on the balance sheet of the predecessor partnership does not mean that it did not exist. It only means that the good will had not been purchased by the predecessor partnership and thus, did not have a cost basis. Thus, even if this conservative amount of good will and the book value of the other assets transferred is used, appellee's "debt-equity ratio" was approximately three to one which is comfortably within<sup>8</sup> permissible limitations. The value of good will is properly includible in determining whether the corporation was inadequately or "thinly" capitalized. Miller's Estate v. Commissioner, 239 F.2d 729 (9th Cir. 1956).

---

8

See Earle v. W. J. Jones & Son, Inc., supra, and cases collected in Caplin, The Caloric Count of the Thin Incorporation, N.Y.U. 17th Inst. on Fed. Tax, 771, 782-783, 792-795 (1959).



(9) Identity of Interest Between Creditor and Stockholder. As is normal in the case of issuing debt securities to shareholders of a close corporation, the Debenture Bonds were issued to Messrs. Hayman and Driskel in the same proportions that they held capital stock in appellee.

(10) Payment of Interest. Payment of interest on the Debenture Bonds was to be made in all events and all interest payments were always timely made and none were ever omitted during the four year period that the indebtedness was outstanding. (I-R. 216-217, II-R. 83) Thus, in design and in practice, interest was in no way contingent upon appellee's earnings.

(11) The Ability of the Corporation to Obtain Loans from Outside Lending Institutions. It appears to be upon this single criterion that appellant argues for the proposition that the Debenture Bonds should not be considered as evidences of indebtedness. Appellant sets forth a lengthy philosophical discussion attacking the marketability of the Debenture Bonds, (Br. 24-28) and that hypothetical outside lenders could not have been procured under the terms of the Debenture Bonds as issued since the interest rate of four (4%) percent was too low and the Debenture Bonds did not provide adequate security for the bondholder.

Appellee submits that the determination of the



1 four (4%) percent per annum interest rate by its  
2 Board of Directors was reasonable and did cause the  
3 Debenture Bonds to be marketable. There can be no  
4 question from the testimony that the intent was to  
5 arrive at a reasonable rate of interest. (II-R. 34-35)  
6 This rate of interest was higher than that being paid by  
7 savings and loan associations, although appellant has  
8 implied that such was not the case.<sup>9</sup>

9 It should also be noted that appellee was not  
10 free to provide for an unlimited rate of interest, lest  
11 its Debenture Bonds be likewise attacked as constituting  
12

13  
14 <sup>9</sup>

15 The interest rate being paid by savings  
16 and loan associations in California in 1952 was  
17 three (3%) percent. See 59th ANNUAL REPORT OF  
18 BUILDING & LOAN COMMISSIONER, STATE OF CALIFORNIA  
19 18 (1952). Also, the maximum interest rate for  
20 long-term commercial deposits in savings accounts  
21 of Federal Reserve Member Banks in 1953 was two and  
22 one-half (2-1/2%) percent, and the average pre-  
23 vailing rate of interest paid on United States  
24 government securities at that time ranged from  
25 1.72% to 2.13%. See FEDERAL RESERVE BULLETIN,  
26 December 1953, at 1336, 1357.

- - - - -





equity investments because of an excessive interest rate.

As to security provisions, the Debenture Bonds did provide for acceleration upon default which was enforceable in a court of law. As for the absence of liens on assets, the reliance on the general credit of the corporation is precisely the distinctive feature of a debenture bond. Appellee submits that the absence of the other security provisions listed by appellant did not deprive these Debenture Bonds of marketability.

In summary, appellant's entire attack on the Debenture Bonds appears to be based on a claimed lack of compliance with the "marketability" criterion. Appellee, on the other hand, unequivocally demonstrated that it strictly met no less than nine of the listed criteria and strongly

---

<sup>10</sup> In Nassau Lens Co., Inc. v. Commissioner, supra, at p. 47, the court stated that:

". . . although the usual question relates to whether the debt is too risky, the Court may also consider whether the loan is not risky enough in the sense that the interest or discount sought to be deducted is substantially higher than the going market rate for loans of the kind involved. . . . In such case, a court may well determine the distorted interest or discount rate is, in terms of substantial economic reality, a dividend."



urges that the "marketability" criteria was also met.<sup>11</sup>

If appellant's implicit argument were accepted, i.e., that if a security is not totally marketable, there is no debt, then closely held corporations would be

---

<sup>11</sup> The entire thrust of appellant's argument on this point seems to be a combination of governmental second-guessing of business decisions made over fifteen years earlier together with some mystical claim of tax avoidance or sham which is based upon the premise that the appellee corporation was merely an alter ego of its stockholders. This similar approach by the Commissioner drew this comment from the Tax Court recently in Estate of Powel Crosley, Jr., 47 T.C. \_\_\_, No. 29:

"The original deficiency in this case is in excess of \$1,000,000. Respondent is after big game, but his weapons, sections 2402, 2036 and 2038, are blunt against the impervious hide of the decedent's estate planning. Arguments that there was an elaborate and deliberately confused tax-avoidance scheme concocted by masterminds, are just not supported by the evidence before us. Respondent's quarry is not to be bagged by mere characterizations and repetitive but unsupported charges of 'sham' and 'tax avoidance scheme'." (Emphasis added)





precluded from issuing debt securities. Appellant has cited no authority for such a proposition. Indeed, the authorities all pursue a weighting of the various cited criteria at arriving at their determinations.

Appellee submits that this weighting process is clearly illustrated in each of the cases which appellant has cited. (Br. 27-28) For instance, in Nassau Lens Co., Inc. v. Commissioner, supra, the court clearly considered the marketability criteria to be only another factor in its ultimate determination.

---

<sup>12</sup> In Taft v. Commissioner, supra, payments on an unsecured, non-interest bearing promissory note over a five-year period were held to be payments on a bona fide indebtedness.

<sup>13</sup> At p. 47 the court stated:

"The starting point is, of course, whether there is an intent to repay, for in the absence of that, no debt can be said to exist. . . . Other factors to be considered relate to the extent to which the debentures bear a substantial risk of the enterprise and, like risk capital, are tied up indefinitely with the success of the venture. . . . Relevant considerations are whether the debt instruments are subordinate



1 In Wilbur Security Co. Commissioner, supra, the court  
2 found that the taxpayer had conceivably met only two  
3 of the eleven criteria.<sup>14</sup> In Affiliated Research, Inc.  
4 v. United States, 351 F.2d 646 (Ct. Cl. 1965), the court  
5 found that not only would no outsider have loaned money  
6 on the basis of the notes but that the debt-equity ratio  
7 of the corporation ranged from 72-1 to 131-1, and that  
8 there had been an outright subordination. In O.H. Kruse  
9 Grain and Milling v. Commissioner, supra, the court found  
0 that the taxpayer had clearly met only one of the eleven  
1 criteria - to wit, he had used the form of a promissory  
2 note.

---

3  
4 to those held by outsiders or whether they  
5 specify a relatively fixed date upon which  
6 the creditor may demand a definite sum regard-  
7 less of the profits earned. . . .The Tax Court  
8 should also give consideration to the debt-equity  
9 ratio and the question of whether outside investors  
0 would have made similar advances."

1 <sup>14</sup> At p. 662, n.1, the court stated:

2 "There was in fact no fixed maturity date; so  
3 called "interest" payments depended upon the  
4 taxpayer's earnings; the determination of  
5 whether interest would be paid. . . was solely  
6 in the discretion of the taxpayer's board



1 It is obvious that none of the cases relied  
2 upon by the appellant have even the remotest similarity  
3 to these proceedings. While appellee is not attempting  
4 merely to quantify these criteria, appellee does  
5 contend that when so many of them have been fully met  
6 (especially those of "intent" and "adequate  
7 capitalization") appellee should prevail on this issue.

8 B. The Redemption Premium Payments Were  
9 Deductible.

0 Appellant asserts for the first time during  
1 any of these proceedings and without stating any pertinent  
2 authority therefor, that even if the Debenture Bonds are  
3 held to be "indebtedness" within the meaning of the  
4 Internal Revenue Code, the redemption premium payments  
5 are nevertheless not deductible. (Br. 28)

6 Section 162(a) of the Internal Revenue Code  
7 provides generally that all ordinary and necessary

8  
9 of directors; the notes were not paid on due  
10 dates; there was no attempt to enforce payment  
11 . . .; and outsiders would not have made ad-  
12 vances under like circumstances, to wit, for  
13 an indefinite length of time, in effect sub-  
14 ject to the risks of the business, and the  
15 return thereon being exclusively within the  
16 discretion of the taxpayer's board of directors."





1 business expenses paid or incurred by a taxpayer are  
2 deductible. Treas. Reg. §1.61-12(c) specifically provides:

3       "(1) If bonds are issued by a corpo-  
4 ration at their face value, the corporation  
5 realizes no gain or loss. If the corporation  
6 purchases any of such bonds at a price in  
7 excess of the issuing price or face value,  
8 the excess of the purchase over the issuing  
9 price or face value is a deductible expense  
10 for the taxable year." (Emphasis added)

11 For cases allowing bond redemption premiums to be  
12 deductible as business expense, see Roberts & Porter, Inc.  
13 v. Commissioner, 307 F.2d 745 (7th Cir. 1962); San Joaquin  
14 Light & Power Corp. v. McLaughlin, 65 F.2d 677 (9th Cir.  
15 1933). Accordingly, there can be little question but that  
16 the premiums paid by appellee on the redemption of its  
17 Debenture Bonds were properly deductible under section  
18 162 of the Internal Revenue Code.

19       Moreover, it is submitted that the premium  
20 payments were likewise deductible as interest on indebted-  
21 ness under section 163 of the Internal Revenue Code.  
22 In Rev. Rul. 57-198, 1957-1 C.B. 94, the Internal  
23 Revenue Service expressly conceded that:

24       ". . .penalty payments made by a taxpayer  
25 to his mortgagee for the privilege of pre-  
26 paying his mortgage indebtedness are



1 deductible as interest under the provisions  
2 of section 163. . ."

3 The applicability of this revenue ruling to the bond  
4 redemption premium payments made by appellee is manifest.

5 There was no evidence as appellant next contends  
6 that appellee redeemed the debentures "merely because  
7 corporate earnings were high". Rather, the purpose  
8 for the early redemption according to the irrefuted testi-  
9 mony of Messrs. Hayman and Hannam was due to (1) a cash  
10 position which the Board of Directors considered to be  
11 in excess of immediate working capital requirements; (2)  
12 the elimination of the Debenture Bonds from the balance  
13 sheet as long-term debt;<sup>15</sup> (3) a saving of half of the  
14 remaining interest that would have otherwise been paid; and  
15 (4) taking a tax deduction on the payments at a time when  
16 the profits were higher than anticipated. (II-R. 36-37, 92)  
17 The existence of any of these reasons would qualify the  
18 payments as an ordinary and necessary business expense,  
19 appellant's unsupported assertions to the contrary  
20 notwithstanding.

21  
22 <sup>15</sup> As discussed by Mr. Hayman (II-R. 88-92) appellee  
23 was obviously disadvantaged in having its Debenture  
24 Bonds reflected on its financial statements to its  
25 customers and on Dun & Bradstreet credit reports, as  
26 long-term debt. Exhibit 29.





1 Appellant also contends that failure of the  
2 District Court's Memorandum Opinion (I-R. 196) to state  
3 that the redemption premiums were reasonable in amount  
4 establishes that the court "allowed the claimed deductions  
5 to taxpayer without considering the question of whether  
6 the 'redemption premium' payments qualified for deductions."  
7 (Br. 28, n.17) An examination of the entire record  
8 clearly demonstrates that this issue was never previously  
9 raised by appellant. Accordingly, the District Court  
10 was not required to make a finding on a matter which  
11 was not an issue.

12 It is well settled that neither party (including  
13 the government) may raise for the first time on appeal  
14 an issue not previously raised in the Trial Court.  
15 General Utilities & Operating Co. v. Helvering, 296 U.S.  
16 200 (1935); Doric Co. v. Commissioner, 341 F.2d 967  
17 (9th Cir. 1965); Commissioner v. Belridge Oil Co.,  
18 297 F.2d 345 (9th Cir. 1959). It was not until  
19 appellant filed its brief in this case that the issue  
20 was raised that the bond redemption premiums did not  
21 qualify "as a business expense under section 162(a)  
22 of the 1954 Code, supra, let alone as interest." (Br. 29)  
23 An examination of the statutory notice of deficiency  
24 (Exhibit 4), the pre-trial conference order (I-R. 131, 132)  
25 and all of the arguments made by government counsel  
26 during the trial establishes this. As was pointed out in



1 General Utilities & Operating Co. v. Helvering, supra,  
2 a taxpayer is entitled to know with fair certainty  
3 the basis of the government's claims against him.  
4 Appellant should not be permitted to raise this new  
5 issue for the first time on appeal.

6 C. The District Court Applied The Correct  
7 Standards.

8 Appellant urges with questionable candor  
9 to this Court that the District Court applied an  
0 erroneous standard, claiming that the District Court  
1 erroneously limited its inquiry to whether the  
2 Debenture Bonds were enforceable as debt under state  
3 law and to whether the issuance constituted a fraud  
4 against the United States. (Br. 21) Appellant has  
5 conveniently ignored the cogent explanation by the  
6 District Court on the hearing of appellant's Motion  
7 for Court to Reconsider Memorandum Opinion. (Tr. 1-8)  
8 After appellant there complained of undue emphasis  
9 having been placed on the word "legitimate", the court  
0 replied:

1 "When I said legitimate I didn't mean that  
2 it was legal as opposed to illegal, I meant  
3 that it was what it purports to be. They  
4 took some security notes instead of stock  
5 and they had a right to do that. . .there  
6 was no subterfuge. . .these taxpayers are



1 entitled to operate their business as they  
2 see fit within certain limitations, true,  
3 but I don't know any other word I could use  
4 but 'legitimate'." (Tr. 5-6)

5 This statement by the District Court supplements  
6 and clarifies its comments at the trial which made it clear  
7 that use of the term "legitimate" meant only that share-  
8 holders have a right to select a proper alternative  
9 which produces less tax consequences. (II-R. 140-141)  
0 That the District Court clearly recognized its  
1 responsibilities and the standard to be applied is its  
2 further statement that "the fact that they are called  
3 debenture bonds. . .isn't persuasive with me unless they  
4 are proven to be debenture bonds." (II-R. 19)

5 The District Court had properly presented to  
6 it the question of whether the Debenture Bonds were  
7 what they purported to be -- evidence of indebtedness  
8 for purposes of federal taxation. It heard evidence on  
9 all of the criteria discussed herein, and on the basis  
0 of such evidence, correctly determined this question.

## 2 II

3 The District Court Correctly Determined That Appellee Had  
4 Properly Computed And Claimed As Deductions Its Annual  
5 Additions To Its Reserve For Bad Debts.

6 Appellee made additions to its bad debt reserve





1 for the taxable years 1958 and 1959 in the amounts of  
2 \$3,313.80 and \$1,800.00, respectively. The Commissioner  
3 disallowed the entire addition for the taxable year 1958  
4 and disallowed \$882.75 of the addition for the taxable  
5 year 1959. The District Court properly sustained  
6 appellee's deductions taken for the addition in each  
7 year.

8           Section 166(c) of the Internal Revenue Code  
9 of 1954, as amended, allows a deduction for either debts  
10 which became worthless during the year or (in the dis-  
11 cretion of the Secretary or his delegate) for a reasonable  
12 addition to a reserve for bad debts. Treas. Reg. §1.166-4(b)  
13 states that such a reasonable addition to a bad debt  
14 reserve shall be determined in the light of the facts  
15 existing at the close of the taxable year. The reason-  
16 ableness of the addition will vary between classes of  
17 business and with conditions of business prosperity and  
18 will depend primarily upon the total amount of debts  
19 outstanding at the close of the taxable year and the  
20 total amount of the existing reserve.

21           From its inception, appellee has employed the  
22 reserve method of accounting for bad debts. (I-R. 217-218)  
23 Appellee's accounts receivable had steadily risen from  
24 approximately \$32,000.00 in its taxable year 1954 to  
25 \$321,000.00 by the end of taxable year 1959. (I-R. 126)  
26 At the end of taxable year 1958, appellee had a balance in



1 its reserve for bad debts of \$3,426.51 before the adjust-  
2 ment required to the reserve for that year. Appellee's  
3 officers and directors determined that \$3,313.80 was a reason-  
4 able addition to the reserve for that year, bringing the  
5 reserve balance to \$6,740.31 (approximately 2.8% of its  
6 then outstanding accounts receivable). (I-R. 126) At the  
7 end of taxable year 1959, appellee had a balance in its  
8 reserve for bad debts of \$5,392.34 before the adjustment re-  
9 quired to the reserve for that year. Appellee's officers  
0 and directors determined that \$1,800.00 was a reasonable  
1 addition to the reserve for that year, bringing the reserve  
2 balance to \$7,192.34 (approximately 2.2% of its then out-  
3 standing accounts receivable). (I-R. 126)

4 The Commissioner made its determination of reason-  
5 able additions to the reserve for bad debts for 1958 solely  
6 on the basis of the ratio of the total uncollectible accounts  
7 charged to the reserve for the years 1954 through 1958  
8 (1.2116% of total accounts receivable for that period) and  
9 for 1959 solely on the ratio of the total uncollectible  
0 accounts charged to the reserve for the taxable years 1954  
1 through 1959 (.93219% of accounts receivable for that period)  
2 (I-R. 126-127)<sup>16</sup>

3 <sup>16</sup>Note that in either case, the determinations by  
4 appellee and appellant as to reasonable additions to the re-  
5 serve represent an insignificant percentage of appellee's  
6 total accounts receivable. Appellant's formula approach is





Appellee carried its burden of proof of showing that the Commissioner's determination was erroneous. Appellee's burden was to prove that the Commissioner abused his discretion, as noted in the cases cited by appellant. (Br. 14-15) However, appellee does not agree, nor does appellant cite any authority, that appellee must prove that the Commissioner's determination was "arbitrary". (Br. 18) Appellee submits that the Commissioner's determination was inaccurate and incomplete. It consisted of a simple mathematical calculation based solely upon past experience of losses. Such a formula approach is merely the starting point of a reasonable determination and is to be supplemented by other facts and circumstances bearing upon reasonableness. This Court has recognized that such reliance on past history alone is merely a starting point in the determination of reasonable additions where other factors are extant. In Calavo, Inc. v. Commissioner, 304 F.2d 650, (9th Cir. 1962), it was stated at p. 654:

"Since the reserve normally is dealing with unknown factors bearing upon unidentifiable accounts, its reasonable extent is ordinarily calculated by resort to past experience with such accounts in the composite. But the fact that experience is even more unreasonable in view of the fact that the "past" history" involves a period during which accounts receivable increased 1000%.



1 the guide in dealing with unknown factors and  
2 unidentifiable accounts should not require us  
3 to reject the more accurate guidance of known  
4 factors bearing upon identifiable accounts when  
5 such information is available. The extent of a  
6 reasonable reserve should depend upon an adjust-  
7 ment between circumstances and experience.

8 "It is in the making of this adjustment that  
9 the discretion of the Commissioner operates in cases  
0 such as this. The question upon review is whether  
1 the result amounts to an abuse of discretion."

2 (Emphasis added)

3 The unrebutted testimony of Messrs. Hannam and  
4 Hayman established that at the end of each year account  
5 receivable cards were pulled, listed and segregated by age;  
6 that a complete, individual review of all accounts receivable  
7 were then made by the accountant with the credit manager and  
8 in most instances by the appropriate officers of appellee;  
9 that the identical practice was used each year; that smaller  
0 accounts were being added in each year in question, thus in-  
1 creasing the general probability that increased losses would  
2 be incurred; and that based upon the individual review of  
3 the segregated, aged accounts, a reasonable addition to the  
4 reserve for bad debts based upon both past history and future  
5 probability of anticipated losses was arrived at. (II-R.  
6 37-39, 93-96) This extensive method of arriving at annual





1 reasonable additions to the reserve for bad debts were  
2 found as a fact by the District Court to be in accordance  
3 with sound business judgment and accepted accounting  
4 practices. (I-R. 218) Appellant submitted absolutely  
5 no evidence to rebut the fact that this thorough, sound  
6 and systematic method of arriving at the additions to the  
7 reserve had been followed, or to rebut the fact of appellee's  
8 changing business conditions. Appellant merely states that  
9 the testimony submitted by appellee was "unsupported" and  
0 "self-serving".<sup>17</sup> (Br. 18) Appellee urges that employment  
1 of sound business judgment and the use of accepted  
2 accounting practices is considerable "support" for a  
3 decision to make an indicated addition to a reserve for  
4 bad debts.

5 Appellant contends that appellee has a "heavy"  
6 burden of proof and sets forth a partial quotation from Art  
7 Metal Const. Co. v. United States, 17 F.Supp. 854 (Ct.Cl.  
8 1937) (Br. 15-16) to the effect that the Commissioner's  
9 determination that an addition was not reasonable would not  
0 be lightly set aside. However, it is important to see the  
1 full context of the quotation. In the same paragraph from  
2 which appellant quotes, at p.863, the Court went on to state  
3 the following:

---

4 <sup>17</sup>For a discussion of the weight to be given to the  
5 testimony of Messrs. Hayman and Hannam, see p. 16, supra,  
6 footnote 6.





1 ". . .the total amount charged off by  
2 plaintiff from 1921 to 1927, inclusive,  
3 amounted to. . .an average of \$7,769.71  
4 a year. . .The balance in the reserve as  
5 fixed by plaintiff at December 31, 1927,  
6 was \$177,114.51, an amount more than three  
7 times the total charge off from 1921 to  
8 1927, inclusive. When, therefore, the  
9 Commissioner allowed an addition for 1927  
0 of \$11,680.38 and showed a balance in the  
1 reserve at December 31, 1927, of \$84,171.28,  
2 a showing of unusual circumstances would be  
3 necessary to require a conclusion that the  
4 Commissioner had abused his discretion. . ."<sup>18</sup>

5 Finally, appellant states that the District  
6 Court erroneously placed the burden of proof on appellant  
7 and required appellant to show that appellee had abused  
8 its discretion. (Br. 19) This statement is wholly with-  
9 out support. The District Court made a finding of fact  
0 that in determining the amounts of annual additions to

---

1 <sup>18</sup> A comparison with the almost de minimus figures  
2 and percentage differentials involved in the instant  
3 controversy shows that the facts of the Art Metal Const.  
4 Co., supra, case are not even remotely comparable.

5 - - - - -



1 its reserve for bad debts, appellee's accounts receivable  
2 were periodically reviewed and aged with a view toward  
3 determining reasonably anticipated losses; that those  
4 determinations were made in accordance with sound  
5 business judgment and accepted accounting standards  
6 and fully complied with the requirements of section  
7 166(c); and that appellant's disallowances which were  
8 based solely upon appellee's past history of losses  
9 and without any regard to present facts and circum-  
0 stances and anticipated future events were erroneous.

1 (I-R. 218)

2 Thus, appellee carried its burden of proof  
3 that the Commissioner abused his discretion.

4 - - - - -  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6






CONCLUSION

The District Court properly considered the questions presented to it and determined that appellee's Debenture Bonds were, in fact, precisely what they purported to be and that appellee properly claimed deductions for interest and bond redemption premium payments. It also determined that appellee's annual additions to its bad debt reserves were reasonable in amount. The record in this case thoroughly supports these determinations which should be affirmed in all respects.

Respectfully submitted,

GOODSON AND HANNAM

By:

  
WALTER S. WEISS

By:

  
RICHARD W. CRAIGO

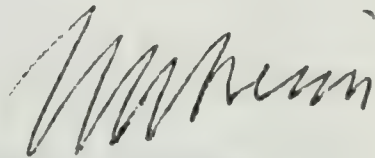
Counsel for Appellee



CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Dated: March 10, 1967.



WALTER S. WEISS



No. 21104

---

**In the United States Court of Appeals  
for the Ninth Circuit**

---

**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**HASKEL ENGINEERING & SUPPLY COMPANY, APPELLEE/**

---

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN (NOW CENTRAL) DIS-  
TRICT OF CALIFORNIA**

---

**REPLY BRIEF FOR THE APPELLANT**

---

**RICHARD C. PUGH,**

*Acting Assistant Attorney General,*

**LEE A. JACKSON,**

**HAROLD C. WILKENFELD,**

**SOLOMON L. WARHAFTIG,**

*Attorneys,*

*Department of Justice,*

*Washington, D.C. 20530.*

*Of Counsel:*

**WILLIAM M. BYRNE, Jr.,**

*United States Attorney.*

**CHARLES H. MAGNUSON,**

*Assistant United States Attorney.*

---

**FILED**

**APR 7 1967**

**APR 3 1967**

**WM. B. LUCK, CLERK**





# INDEX

---

Argument:	Page
I. The bad debt deductions.....	1
II. The "debenture" payment deductions.....	2
A. The District Court's standard.....	2
B. The "debentures".....	3
C. The "redemption premium" payments....	5

## CITATIONS

Cases:	
<i>Earle v. W. J. Jones &amp; Son</i> , 200 F. 2d 846.....	4
<i>Gregory v. Helvering</i> , 293 U.S. 465.....	5
<i>Karkus v. Siefert</i> , 169 F. Supp. 662.....	2
<i>Kruse, O. H., Grain &amp; Milling v. Commissioner</i> , 279 F. 2d 123.....	3
<i>Los Angeles Shipbuilding &amp; Drydock Corp. v. United States</i> , 289 F. 2d 222.....	4
<i>Maloney v. Spencer</i> , 172 F. 2d 638.....	4
<i>Miller Mfg. Co. v. Commissioner</i> , 149 F. 2d 421.....	2
<i>Oswald, R. H., Co. v. Commissioner</i> , 185 F. 2d 6.....	2
<i>Reinecke v. Spalding</i> , 280 U.S. 227.....	6
<i>Taft v. Commissioner</i> , 314 F. 2d 620.....	4
<i>United States v. Snyder Brothers Co.</i> , 367 F. 2d 980, certiorari denied March 13, 1967 (35 U.S. Law Week 3322).....	4, 5
<i>Wilshire and West. Sandwiches v. Commissioner</i> , 175 F. 2d 718.....	4
<i>Yin-Shing Woo v. United States</i> , 288 F. 2d 434.....	2



# **In the United States Court of Appeals for the Ninth Circuit**

---

No. 21104

UNITED STATES OF AMERICA, APPELLANT

*v.*

HASKEL ENGINEERING & SUPPLY COMPANY, APPELLEE

---

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN (NOW CENTRAL) DIS-  
TRICT OF CALIFORNIA

---

## **REPLY BRIEF FOR THE APPELLANT**

---

### **ARGUMENT**

#### **I. The bad debt deductions**

While the amount of the bad debt deductions that are here in issue, \$4,196.55, is hardly "*de minimis*" (compare Taxpayer's Br. 12), the Government's primary concern is that, in allowing taxpayer the deduction that it claimed, the District Court has distorted not only the more stringent standard of proof applicable to deductions for additions to a reserve for bad debts but also the ordinary standard that is applicable to other claimed deductions. In the light of taxpayer's constantly improving bad debt experience, as the amount of its accounts receivable was increasing, the Commissioner's use of taxpayer's average experience

was certainly not an abuse of his discretion. But, more significantly, taxpayer even failed to prove that the amounts of the deductions that it claimed were reasonable. Taxpayer's evidence went only to the method used by its officers in arriving at what *they* considered to be reasonable additions for the bad debt reserve. Taxpayer offered no evidence with respect to the rates actually used and the computations of these rates, which would have permitted the Commissioner, in the first instance, and then the District Court to determine, objectively, whether the rates used were reasonable. Since the test of "reasonableness" does not refer to the subjective belief of the taxpayer or its officers but always depends on an objective determination by the Commissioner and the court (see *Miller Mfg. Co. v. Commissioner*, 149 F. 2d 421, 423 (C.A. 4th); *R. H. Oswald Co. v. Commissioner*, 185 F. 2d 6, 8-10 (C.A. 7th); cf. *Yin-Shing Woo v. United States*, 288 F. 2d 434, 435 (C.A. 2d); *Karkus v. Siefert*, 169 F. Supp. 662, 666 (N.J.)), certainly, in providing that additions to a reserve for bad debt are allowable in the *discretion* of the Commissioner (1954 Code, Section 166(c)), Congress did not intend that even a good faith determination by a corporation's officers of what, in their opinion, constituted a reasonable addition would not be subject to administrative and judicial review.

## II. The "debenture" payment deductions

### A. The District Court's standard

Contrary to taxpayer's argument (Br. 33-34), we submit that the District Court's statement on the hear-



ing of the Government's motion to reconsider the memorandum opinion (which statement appears at pages 5 and 6 of the transcript of that hearing and which was cited in our brief (p. 21) as II-R. 194-195) lends further support to our contention (Br. 19-22) that the court applied an incorrect standard in the decision of this issue. While the court's statement suggests that it recognized that it was not sufficient that the "debentures" constituted indebtedness for state law purposes, the court still regarded the question as being whether the issuance of the "debentures" was a "subterfuge", i.e., whether there was an understanding that taxpayer's stockholders would not enforce the "debentures" according to their terms. It is clear that the District Court never reached the crucial question upon which the deductibility of the "debenture" payments depended—whether, as a matter of substantial economic reality, the payments constituted true "interest \* \* \* on indebtedness" or "ordinary and necessary [business] expenses".

#### B. The "debentures"

Taxpayer attempts to uphold the District Court's holding that the "debentures" qualified as indebtedness by arguing that the greater number of the eleven factors enumerated by this Court in *O. H. Kruse Grain & Milling v. Commissioner*, 279 F. 2d 123, 125-126, furnished support for it. Taxpayer, however, fails to realize that the determination of whether an instrument represents a capital investment or indebtedness depends on an evaluation of the substance of the relationship that the instrument

creates between the stockholder and the corporation and that these and other factors<sup>1</sup> are only guides for this evaluation. We submit that, as we have shown in our opening brief (pp. 22-28), where the stockholders' advances to the corporation, in proportion to their stock interests, consist of essential assets necessary to start the corporate life and are unsecured and of extended duration (20 years)—so that they fail to comply with the arm's length standard that would be demanded by an outside creditor, where the holders of the "debentures" have personally guaranteed a continuing line of credit for the corporation and where the return to be received with respect to the "debentures" resembles the return of one making a capital investment,<sup>2</sup> to treat "inter-

---

<sup>1</sup> In *Kruse* this Court stated (279 F. 2d, p. 125) that "There are *at least* eleven separate determining factors generally used by the courts in determining whether amounts advanced to a corporation constitute equity capital or indebtedness." (Emphasis supplied.) Other relevant factors are whether the advances were part of the initial funds necessary to start the corporate life, whether the term of the instrument is an extended one, whether the instruments are secured, and whether there is any limitation on the payment of dividends or a provision for a reserve or sinking fund for payment of the instrument. See *United States v. Snyder Brothers Co.*, 367 F. 2d 980, 984, 985 (C.A. 5th), certiorari denied March 13, 1967 (35 U.S. Law Week 3322).

<sup>2</sup> The combination of facts present here distinguishes the instant case from the cases cited by taxpayer (Br. 15) (*Taft v. Commissioner*, 314 F. 2d 620 (C.A. 9th); *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 289 F. 2d 222 (C.A. 9th); *Earle v. W. J. Jones & Son*, 200 F. 2d 846 (C.A. 9th); *Wilshire and West. Sandwiches v. Commissioner*, 175 F. 2d 718 (C.A. 9th); *Maloney v. Spencer*, 172 F. 2d 638 (C.A. 9th)) where the instruments in question were held to represent indebtedness.

est” and “redemption premium” payments with respect to the “debentures” as something other than dividends “would be to give substance to a ‘transaction [which] upon its face lies outside the plain intent of the statute’ [*Gregory v. Helvering*] 293 U.S. 465, 470.” *United States v. Snyder Brothers Co.*, 367 F. 2d 980, 985 (C.A. 5th), certiorari denied March 13, 1967 (35 U.S. Law Week 3322).

#### C. The “redemption premium” payments

Taxpayer, not disputing the fact that the purported “redemption premium” payments were wholly unreasonable in amount (Govt. Br. 26, 29), now argues (Br. 32-33) that the issue of whether or not these payments were deductible was not raised in the court below. This contention is, however, clearly without merit; for the pre-trial conference order shows that taxpayer recognized (I-R. 131) that the issue of whether the “redemption premium” payments were deductible was being raised by the Government as an independent question. In order to obtain a deduction for these payments taxpayer was required to prove

that the amounts paid qualified under a statutory provision authorizing a deduction. *Reinecke v. Spalding*, 280 U.S. 227, 232-233.

Respectfully submitted.

RICHARD C. PUGH,  
*Acting Assistant Attorney General*,  
 LEE A. JACKSON,  
 HAROLD C. WILKENFELD,  
 SOLOMON L. WARHAFTIG,  
*Attorneys*,  
*Department of Justice*,  
*Washington, D.C. 20530.*

APRIL, 1967.

*Of Counsel:*

WILLIAM M. BYRNE, JR.  
*United States Attorney.*

CHARLES H. MAGNUSON,  
*Assistant United States Attorney.*

#### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

-----  
*Attorney*

21116

3396

No. 2

In the

# United States Court of Appeals

*For the Ninth Circuit*

WALTER SELINGER,

*Appellant,*

vs.

LESTER BIGLER, Special Agent of the  
Internal Revenue Service, et al,

*Appellee.*

Upon Appeal from the District Court of the United States  
for the District of Arizona

## Appellant's Brief

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

10th Floor - 111 West Monroe

Phoenix, Arizona

*Attorneys for Appellant*

FILED

DEC 11 1957



11

## SUBJECT INDEX

	Page
Jurisdictional Statement .....	1
Statement of the Case.....	2
Specifications of Errors.....	5
Argument .....	5
I. The District Court Failed to Find That Mr. Selinger Waived His Constitutional Rights.....	5
II. Before a Taxpayer Can Be Questioned by a Special Agent of the Internal Revenue Service, Whose Duty Is to Investigate Criminal Tax Fraud, the Taxpayer Must Be Informed of His Right to Counsel.....	9
III. Mr. Selinger Did Not Voluntarily Consent to the Ex- amination and Photo Copying of His Books and Records .....	18
Conclusion .....	20
Certificate .....	20
Table of Exhibits .....	App. 1

## TABLE OF AUTHORITIES CITED

CASES	Pages
Channel v. United States, 285 F.2d 217 (9th Cir. 1960).....	6
Cipres v. United States, 343 F.2d 95 (9th Cir. 1965). ....	7, 8
Escobedo v. Illinois, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964) .....	9, 11, 12
Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964).....	6
Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1954).....	6
Johnson v. Zerbst, 304 U.S. 458; 58 S.Ct. 1019; 82 L.Ed. 1461 (1938) .....	6
Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965).....	13, 14
Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).....	9
Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964).....	6
McDonald v. United States, 307 F.2d 272 (10th Cir. 1962).....	6
Miranda v. Arizona, 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed. 694 (1966) .....	14, 15, 16
Pekar v. United States, 315 F.2d 319 (5th Cir. 1963).....	6
United States of America and Bennett Y. Brewer, Special Agent v. Gerald Rosen, No. Civil 5739-Phoenix, Arizona.....	16
United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959)....	19
United States v. Page, 302 F.2d 81 (9th Cir. 1962).....	8, 9
United States v. Selafani, 265 F.2d 408 (2nd Cir. 1959).....	14

## ARTICLES

Balter, "Special Agent Need Not Advise a Taxpayer of His Constitutional Rights", The Journal of Taxation, July, 1966	9
Burns, Searches & Seizures: The Suppression of Evidence, N.Y.U. 20th Institute on Federal Tax 1081 (1962).....	10
Walter E. Dillon, "When Your Client Is Under Federal Investigation", The Practical Lawyer, November and December, 1965 .....	17

	Page
James O. Hewitt, "6th Amendment Rights of the Taxpayer in a Fraud Investigation", Bulletin of the Section of Taxation, American Bar Association, January, 1966.....	12

## REGULATIONS

Regulation 1118.6, Statement of Organization and Functions of Intelligence Division, C.C.II. 1965, Standard Federal Reporter, Paragraph 5988 (March 24, 1965).....	10
--	----

## STATUTES

18 U.S.C. 3052 .....	10
26 U.S.C. 7608(b) .....	10





No. 2116

In the

# United States Court of Appeals

*For the Ninth Circuit*

---

WALTER SELINGER,

*Appellant,*

vs.

LESTER BIGLER, Special Agent of the  
Internal Revenue Service, and ROBERT  
LANDESMAN, Internal Revenue Agent,

*Appellees.*

---

Upon Appeal from the District Court of the United States  
for the District of Arizona

## Appellant's Brief

---

### JURISDICTIONAL STATEMENT

This is an appeal by Walter Selinger, plaintiff below, from a final order entered on April 27, 1966, (R., Vol. I at 126), in favor of Lester Bigler and Robert Landesman, defendants below. A notice of appeal was filed on April 29, 1966. (R., Vol. I at 133).

Jurisdiction of this appeal exists under Title 28, U.S.C.A., Section 1291. Jurisdiction of the District Court existed under Rule 41(e) of the Federal Rules of Criminal Procedure, 18 United States Code.

The appellant instituted this suit by filing a motion in the United States District Court for the District of Arizona for the return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. (R., Vol. I at 1).

### **STATEMENT OF THE CASE**

This action was brought by Walter Selinger in the form of a motion for the return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. Plaintiff's motion contended that a Special Agent of the Internal Revenue Service, and an Internal Revenue Agent who accompanied the Special Agent, illegally photocopied Mr. Selinger's books, records and other memoranda in the course of a criminal income tax investigation of Mr. Selinger's business, a sole proprietorship. (R., Vol. I at 1).

A temporary restraining order was granted and an order to show cause hearing was set to determine the disposition of the motion to return property and to suppress evidence. (R., Vol. I at 21). Before the hearing was held on the motion, the defendants moved the Court for an order dismissing the proceedings. (R., Vol. I at 24). The motion to dismiss was taken under advisement by the Court. After the hearing, and in its opinion, the Court denied the defendants' motion to dismiss. (R., Vol. I at 129).

The evidence produced at the hearing revealed that two representatives of the Treasury Department came to Mr. Selinger's place of business and asked to see him on the morning of October 20, 1965. Since Mr. Selinger was not in when the Agents arrived, Lester Bigler, a Special Agent in the Internal Revenue Service, called Mr. Selinger on the telephone. Mr. Bigler did not identify himself or tell Mr. Selinger why he wanted to see him, except that he did iden-

tify himself and Mr. Landesman as "Government Men". The Agents made an appointment with Mr. Selinger for 12:30 P.M. on the same day. When the Agents arrived, Mr. Selinger took them into his private office, where Mr. Bigler showed Mr. Selinger his credentials, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. (R., Vol. I at 127-128). Special Agent Bigler did not inform Mr. Selinger of his function with the United States Treasury Department. (R., Vol. II at 9). Mr. Selinger had never had any other prior dealings with Treasury Agents (R., Vol. II at 20), and he was not aware of the criminal functions of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16). During this interview with Mr. Selinger, Mrs. Renee Selinger, the wife of Mr. Selinger, was also present. Rudy Boehmer, Mr. Selinger's office manager, was also present for a brief period during the interview. (R., Vol. I at 128).

There is substantial disagreement as to what was said by each of the parties during this interview. Both Treasury Agents testified that they told Mr. Selinger who they were and what they wanted, and that Mr. Selinger agreed to let them see all of his business records. On the other hand, Mr. Selinger testified at the hearing that he did not grant permission to the Agents to see his records. (R., Vol. I at 128). Mrs. Selinger's testimony confirmed her husband's statement of the facts. (R., Vol. II at 55).

That same afternoon, both Agents went to the office of Sidney Markow, Mr. Selinger's accountant, and photocopied all of Mr. Selinger's records that were in the accountant's possession. On the following day, October 21, 1965, the Agents returned to Mr. Selinger's place of business and photocopied many of his remaining records. (R., Vol. I at 128). When Mr. Selinger subsequently learned that the

Agents had returned and were copying his records, he contacted a business friend who requested a tax attorney, Harold W. Wales, to contact Mr. Selinger. After speaking briefly with Mr. Selinger, Mr. Wales then talked to Mr. Bigler and, as a result, Mr. Bigler then agreed to leave the premises. (R., Vol. II at 17-19).

After the hearing was concluded, Mr. Selinger retained new counsel, who petitioned the Court to reopen the hearing in order to present the testimony of Mr. Selinger's previous attorney, Harold W. Wales. (R., Vol. I at 65). Although the parties were willing to stipulate that Mr. Wales would testify to exactly what was in his affidavit attached to the motion to reopen, the District Judge decided that he wanted to cross-examine Mr. Wales. (R., Vol. V at 46). Mr. Wales then testified that he called Mr. Bigler on October 21, 1965, and told Mr. Bigler to stop photographing the records. Since Mr. Wales had a client with him in his office, he was not anxious to prolong the conversation. Mr. Wales then excused himself from the client and called Mr. Bigler back and asked for a return of the records that had been photographed. (R., Vol. V at 49). Mr. Bigler testified that he told Mr. Wales that he had permission to examine the books and records of Mr. Selinger during both the first and second telephone conversations. (R., Vol. III at 22-23). Mr. Wales, however, testified that Mr. Bigler made no mention about permission to examine the books and records during either of these telephone conversations. (R., Vol. V at 50, 52).

The Court denied the motion for the return of property and to suppress evidence. In so holding, the Court stated:

"As to the facts themselves, the Court finds: that the petitioner was initially advised by the defendants that one of them was a Special Agent for the Internal Revenue Service; that the other was an Internal Revenue



Service Agent; that they wished to see his business records for the purpose of investigating his tax returns; that petitioner was advised by the defendants that he would not have to show them his records and that he would not have to give them any information if he did not so desire. Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopies by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.

“Since all of the records photocopies by the defendants were obtained with the consent of petitioner, the Court denies petitioner’s motion to suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered.” (R., Vol. I at 129-131).

The District Court did not discuss Mr. Wale’s testimony in its opinion.

### **SPECIFICATIONS OF ERRORS**

1. The District Court erred in denying the motion to return property and to suppress evidence because the Court failed to find that Mr. Selinger waived his rights under the 4th Amendment to the United States Constitution.
2. The District Court erred in holding that none of Mr. Selinger’s constitutional rights had been violated because Mr. Selinger was not advised of his right to counsel.
3. The District Court erred in holding that Mr. Selinger consented to the examination and photocopying of his books and records.

### **ARGUMENT**

#### **I. The District Court Failed to Find That Mr. Selinger Waived His Constitutional Rights.**

Under the 4th and 5th Amendments to the United States Constitution, Mr. Selinger had the right to remain silent as



well as the right to prevent the Government from examining his books and records. The District Court found that Mr. Selinger waived these rights by voluntarily agreeing to let the Internal Revenue Agents examine his records. In order to prove consent, the Government must show that the consent was "unequivocal and specific" and "freely and intelligently given". *Greenwell v. United States*, 336 F.2d 962, 967 (D.C.Cir. 1964). In *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Supreme Court stated at page 464:

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

See also *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1954); *Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963); *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962).

This rule has been followed by the Ninth Circuit. In *Channel v. United States*, 285 F.2d 217, 219-220 (9th Cir. 1960), the Court stated:

"A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied. The Government has the burden of proving by clear and positive evidence that such consent was given. *Judd vs. United States*, 89 U.S. App. D.C. 64, 190 F.2d 649, 650."

See also *State of Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964).

The District Court failed to determine whether Mr. Selinger had waived his constitutional rights under the 4th

Amendment. Instead, the Court merely found that Mr. Selinger agreed that the Agents could examine his business records.

“Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopied by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.

“Since all of the records photocopied by the defendants were obtained with the consent of petitioner, the Court denies petitioner’s motion to suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered.” (R., Vol I at 130-131).

The Court simply believed the testimony of the two Treasury Agents and found that Mr. Selinger had consented to the examination of his books and records. However, the Court erred by not determining whether Mr. Selinger had waived his constitutional rights. In the recent case of *Cipres v. United States*, 343 F.2d 95, 97-98 (9th Cir. 1965) this Court again addressed itself to the question of waiver:

“But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the ‘intentional relinquishment of a known right or privilege.’ *Johnson vs. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively

withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal consent, and such cases are common. They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.

“Giving full credit to the officers’ testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege.”

As in *Cipres*, both Mr. and Mrs. Selinger denied that consent was given to examine their records. However, such consent, if present at all, was obtained “under color of the badge” (in this instance a Treasury badge) and therefore presumptively coerced. *United States v. Page*, 302 F.2d 81 (9th Cir. 1962).

It is also important to realize that we are dealing with a criminal tax fraud investigation and that the investigation was criminal from its inception. In *Cipres*, the defendant Cipres knew that she consented to having her bags searched by criminal law enforcement officials in uniform, and that any evidence found could incriminate her. On the other hand, Mr. Selinger was never informed that he was being criminally investigated, and the testimony is clear that he was not aware of the function of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16). Since Mr. Selinger did not realize that he could be incriminating himself by consenting to the examination of his records, his consent was not intelligently given, “and the consent cannot be deemed voluntary, unless it be made clearly to appear

that it was freely and intelligently given". *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931). See also *United States v. Page*, *supra*.

Since the District Court only found that Mr. Selinger agreed to the examination of his records, this case should be reversed and remanded with instructions to the District Court to determine whether Mr. Selinger freely and intelligently waived his constitutional rights.

## **II. Before a Taxpayer Can Be Questioned by a Special Agent of the Internal Revenue Service, Whose Duty Is to Investigate Criminal Tax Fraud, the Taxpayer Must Be Informed of His Right to Counsel.**

The District Court did not find as a fact that Mr. Selinger was informed of his right to obtain counsel. Moreover, there is no evidence in the record to indicate that he was so informed. By failing to inform Mr. Selinger of this right, the Government Agents deprived him of his rights under the 6th Amendment to the United States Constitution.

Plaintiff submits that whenever a Special Agent of the Internal Revenue Service enters a case, the taxpayer must be informed of his right to counsel. If he is not so informed, any statements he may make or any records seized by the Government with his consent may not be used against him. In *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the Supreme Court held that the defendant had been denied the assistance of counsel in violation of the 6th Amendment at the time the investigation had begun to focus on a particular suspect.

In tax matters, the accusatory stage begins when a Special Agent is assigned to a case because the function of a Special Agent is to investigate criminal tax fraud.<sup>1</sup> As ex-

---

1. Balter, "Special Agents Need Not Advise a Taxpayer of His Constitutional Rights", *The Journal of Taxation*, July, 1966 at pp. 26, 27.



plained by a distinguished former Department of Justice official:

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

Burns, *Searches and Seizures: The Suppression of Evidence*, N.Y.U. 20th Institute on Federal Tax 1081, 1087 (1962). See also Reg. 1118.6, Statement of Organization and Functions of Intelligence Division, C.C.H. 1965, Standard Federal Reporter Paragraph 5988 (March 24, 1965), in which it is stated that the Intelligence Division enforces the criminal statutes applicable to income tax laws.

Special Agents have the same authority as agents of the FBI with respect to arresting individuals, as well as serving warrants and subpoenas, except that Special Agents are not given the right to carry weapons.<sup>2</sup> Moreover, the authority of Special Agents is exclusive since even the FBI is not authorized to investigate criminal tax fraud.<sup>3</sup>

Although an investigation conducted by Special Agents is entirely a criminal one, this fact is rarely known by the taxpayer. When the police or the FBI question an individual, their credentials and appearance identify them as Government Agents who are concerned with criminal law en-

---

2. Compare 18 U.S.C. 3052 with 26 U.S.C. 7608(b).

3. Balter cited at footnote 1.



forcement. However, even though a Special Agent may identify himself and present his credentials, this does not apprise the taxpayer that he is being criminally investigated.<sup>4</sup>

Since a criminal investigation begins when the Special Agent enters the case, and his function is to gather incriminating evidence, the accusatory stage has begun within the meaning of the *Escobedo* case. The taxpayer is therefore entitled to the right to counsel when the Special Agent commences his investigation.

---

4. The appearance of a Special Agent does not reveal his function because he wears a business suit. Also, the credentials of a Special Agent do not indicate that his function is to investigate criminal tax fraud. The credentials shown by Mr. Bigler gave no indication that he was a criminal investigator.

“Q. BY MR. FUERTH: Mr. Selinger, is that the identification that was shown to you?

A. Well, it is similar to what he showed me. I wouldn't swear it was the same one or not.

Q. Could you read what is on there, Mr. Selinger?

A. I said I didn't read the thing.

Q. No, would you read that one.

A. 'U.S. Treasury Department'. Underneath it says, 'Internal Revenue Service', but I looked at the, I looked at the picture.

Q. What else does it say?

A. 'Lester A. Bigler'.

Q. What else? Read the whole thing.

A. I don't see anything else.

Q. Isn't there some writing below that?

A. I never saw that part, sir.

Q. I am asking you to read the whole thing to the Court.

A. I didn't see this part at all.

THE COURT: Just answer the question.

A. 'Lester A. Bigler, whose signature and picture appears above, is duly commissioned special agent, and authority to perform all duties conferred upon such officers under all laws and regulations'.

There is a stamp if I can see it, 'Administered by the Internal Revenue Service, including the authority to investigate, to inquire and receive information as to all matters relating to such laws and regulations'." (R., Vol. II at 23-24).

The main reason the Special Agent interviewed Mr. Selinger was to obtain his permission to examine his books in order to find incriminating evidence. Since most successful criminal tax prosecutions are founded upon the taxpayer's own records, the critical time for the advice of an attorney is when a Special Agent requests permission to examine a taxpayer's books and records. As pointed out by the Supreme Court in *Escobedo*:

"Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so.

"The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. *Powell vs. Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 84 ALR 527. This was the 'stage when legal aid and advice' were most critical to petitioner. *Massiah vs. United States*, supra, 377 U.S. at 204, 12 L. Ed. 2d at 249.

"What happened at this interrogation could certainly 'affect the whole trial', *Hamilton vs. Alabama*, supra, 368 U.S. at 54, 7 L. Ed. 2d at 116, since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes'." 378 U.S. 478 at 485-486.

A comparison of tax fraud cases with other criminal prosecutions supports the contention that the right to counsel attaches when the Special Agent begins his investigation. James O. Hewitt, in his recent article entitled, "*6th Amendment Rights of the Taxpayer in a Fraud Investigation*", Bulletin of the Section of Taxation, American Bar Association, January, 1966, at Page 123, states:

"Taken step by step it becomes apparent that tax fraud cases simply do not follow the traditional pattern of most criminal prosecutions. In the typical criminal

case, step one is knowledge that a crime has been committed. Step two involves the search for suspects and finally step three is the focusing on the accused as the prime suspect. Right to counsel attaches at step three according to *Escobedo*.

“In the tax fraud cases, however, step one is *not* usually knowledge that a crime has been committed but rather a routine audit for the purpose of determining a civil matter having no criminal ramifications of any kind. Step two in the tax case is a suspicion of fraud by the revenue agent often approximating a tentative conclusion on his part that fraud has been committed, and a recommendation that the case be assigned to the Intelligence Division. This, it is suggested, is the fraud equivalent of knowledge that a crime has been committed. Finally, there is step three which is the fraud investigation itself—an investigation aimed not at narrowing down the list of suspects since there is only one suspect—but rather at gathering evidence to prove conclusively in their minds that the one suspect (the taxpayer) has in fact committed the crime of tax evasion.

“The difficulty conceptually is that in the fraud case, as in almost no other, absolute proof of the crime having been committed is also absolute proof that the taxpayer is guilty of it. Thus, to accord the taxpayer constitutional protections only after the existence of the crime has been conclusively proven is to accord him no protection whatever. For this reason it is believed that the taxpayer should be considered the ‘accused’ within the meaning of *Escobedo* at that moment when a suspicion of fraud is effectuated by a fraud investigation and that the right to counsel should attach at this time. Only by so doing can the taxpayer be afforded the same protections accorded to suspects in other areas of the law.”

The Ninth Circuit’s opinion in *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965) should not control this case

because *Kohatsu* involved a different factual situation. In the present case, Mr. Selinger was investigated initially by a Special Agent on the basis of an informer's letter. (R., Vol. I at 132). Therefore, criminal tax fraud was involved from the inception. On the other hand, in *Kohatsu*, the defendant was originally investigated by a Revenue Agent during a routine audit; later, a Special Agent was called in to pursue the matter criminally. The Court in *Kohatsu* relied upon *United States v. Sclafani*, 265 F.2d 408 (2nd Cir. 1959), to the effect that it would be:

“Unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose.”  
265 F.2d at 415.

In our case, there is no problem in determining when a routine tax audit ended and a criminal investigation commenced, since the one and only investigation involved here was criminal.

Moreover, *Kohatsu* was decided prior to the recent case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966). In *Miranda*, the Supreme Court held that “prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed”. 16 L.Ed.2d 694 at 706-707. We submit that this rule should apply equally to Special Agents of the Treasury Department, as well as to the Federal Bureau of Investigation and local law enforcement officials.

In *Miranda*, the defendant was given the right to counsel in order to protect his 5th Amendment privilege against



self-incrimination. Or, as expressed by the Court in *Miranda*, there was a "need for counsel to protect the Fifth Amendment privilege". 16 L.Ed.2d 694 at 721. The same philosophy is just as applicable here. Since an individual cannot properly waive his 5th Amendment rights without the assistance of an attorney, Mr. Selinger also was entitled to counsel in order to properly waive his rights under the 4th Amendment. Since Mr. Selinger did not know the function of a Special Agent and was not aware that he had the right to prevent the Special Agent from examining his books and records, he needed the assistance of counsel to properly advise him of his constitutional rights. Telling him that he could remain silent and that he did not have to give up his books and records is not sufficient to protect a taxpayer who is not aware of his constitutional rights. As pointed out by the Supreme Court in *Miranda*:

"The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. As the California Supreme Court has aptly put it:

"'Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it.' People vs. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal.Rptr. 169, 177-178 (1965) (Tobriner, J.)."

The rationale and philosophy of *Miranda* require that a Special Agent of the Treasury Department must inform an



individual of his right to counsel before the interrogation begins. A person, whether he be an alleged murderer, rapist or tax evader, should be properly apprised of his constitutional rights, and this should be true whether he is being investigated by the FBI, a Special Agent of the Treasury Department or any other law enforcement official. Since the FBI presently informs an individual fully of his rights, including the right to counsel, should the Treasury Department be held to a lower standard?

In emphasizing the practices of the FBI, the Supreme Court in *Miranda* stated:

“Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.” 16 L.Ed.2d at 728-729.

Although Mr. Selinger was not arrested, he was clearly a suspect and, therefore, he should have been advised of his right to counsel.

In its opinion, the Supreme Court in *Miranda* also deplored police manuals which advocated the use of various techniques to be employed by policemen in order to get a suspect to incriminate himself. It would be interesting and revealing if this Court successfully requested that the Government produce the Internal Revenue Manual.<sup>5</sup> An exam-

---

5. In an unreported Order of District Judge Walter E. Craig, in the case of *United States of America and Bennett Y. Brewer, Special Agent v. Gerald Rosen*, No. Civ-5739—Phoenix, Arizona, the Court ordered the Government to produce for inspection the Special Agent's Operating Manual as it relates to the Special Agent's job description and his day to day investigative functions,

ination of this Manual would probably reveal that, unlike the FBI, the Internal Revenue Service is more interested in successfully concluding an investigation, rather than insuring that a suspect is properly informed of his rights. Two excerpts from this Manual indicate that the rights of an individual are clearly secondary to the accomplishment of a successful investigation. See Walter E. Dillon, "*When Your Client is Under Federal Investigation*", the Practical Lawyer, November, 1965, at page 53, and December, 1965, at page 78:

"Consider the following language found in section 9385.1 of the Internal Revenue Manual (May 2, 1955), which contains instructions for revenue agents:

"'When it appears that a natural person may be a possible defendant in a criminal trial, positive steps shall be taken to assure that any evidence he submits is submitted voluntarily or (sic) that he knows and understands, before he submits orally or otherwise, any such evidence, that he is not required to furnish evidence which he believes might incriminate him directly or indirectly under any law of the United States. When appropriate, he should be informed of these rights. *This information should not be given in language so formal, or so couched as to unnecessarily alarm the person interviewed.* (Emphasis (italics) added). Deception, fraud or deceit will not be practiced to obtain such evidence'."

"The following language of section 9353 (4) of the Internal Revenue Manual is somewhat revealing of the attitude of the investigators on the furnishing of statements:

"'A copy of a signed affidavit or transcript of a question and answer statement shall be furnished the witness. However, delivery of such document

---

and any other relevant matters contained therein. Rather than produce this Manual, the Government dismissed its action against Mr. Rosen (November 22, 1965 Order of Judge Craig).

may be accomplished at such time which will not hamper the investigation or hinder a successful trial of the case'."

These two excerpts indicate rather graphically that Special Agents are not concerned with protecting the rights of the individual, and therefore, an attorney is clearly needed to protect such rights.

### **III. Mr. Selinger Did Not Voluntarily Consent to the Examination and Photo Copying of His Books and Records.**

The District Court's decision was clearly erroneous in determining that Mr. Selinger had voluntarily consented to the examination of his books and records. Although the two revenue agents both testified that Mr. Selinger consented to the examination of his books and records, both Mr. and Mrs. Selinger, as well as Rudy Bohmer, Selinger's book-keeper, denied that such permission was given. The Court was thus faced with the credibility of these five witnesses.

Although Mr. and Mrs. Selinger were directly contradicted by the revenue agents, Mr. Bigler, the Special Agent, was contradicted by third party witnesses, as well as the Selingers. Mr. Bigler testified that Mr. Selinger told him in the presence of Rudy Bohmer that it was his understanding that Mr. Selinger intended to cooperate and allow Mr. Bigler to examine his books and records. (R. Vol. III at 13). Mr. Bohmer denied that any such statement was made. (R. Vol. II at 89 and 97).

Mr. Bigler testified that he told Sidney Markow on October 20, 1965, that Mr. Selinger had told him that he could examine the books and records. (R. Vol. III at 14). On the contrary, Mr. Markow testified that Mr. Bigler only stated that Mr. Selinger had told Bigler that he, Markow, had all the books and records. (R. Vol. II at 78).

Mr. Bigler's testimony was also in direct conflict with that of Harold Wales. Mr. Bigler testified that on October 21, 1965, while at Mr. Selinger's office, he stated to Mr. Wales over the telephone that he had permission to examine the books and records of Mr. Selinger. (R. Vol. II at 22). Wales testified that Bigler made no mention during his conversation on October 21, 1965, that permission had been granted by Selinger to Bigler to examine the books and records. (R. Vol. V at 48 through 56). Furthermore, Bigler testified that during the second telephone call from Mr. Wales on the same date, Mr. Wales had asked by what authority Mr. Bigler was copying the books and records, and that Bigler again explained that Mr. Selinger had given him permission to examine such records. (R. Vol. III at 22-23). Mr. Wales testified specifically that in the second telephone conversation with Mr. Bigler, he only asked that the microfilm of the books and records be turned over to Mr. Selinger before Mr. Bigler left. (R. Vol. V at 48-56).

Not only did Mr. Wales' testimony directly conflict with that of Mr. Bigler, but it is inconceivable that Mr. Bigler would inform Mr. Wales during the first telephone conversation that he had permission to examine the records and then, during the second conversation, Mr. Wales would again ask Mr. Bigler by what authority he was photographing the records.

The government had the burden of proving by clear and convincing evidence that Mr. Selinger waived his constitutional rights. See *United States v. Martin*, 176 F. Supp. 262, 266-267 (S.D. N.Y. 1959) where the Court stated:

"Consent to a search may constitute a waiver of the rights secured by the Fourth Amendment. See *United States v. Dornblut*, 2 Cir., 261 F.2d 949; *United States v. Gross*, D.C.S.D.N.Y., 137 F. Supp. 244; *United States v. Reckis*, D.C.D. Mass., 119 F. Supp. 687. Cf. *United*



*States v. Selafani*, 2 Cir., 1959, 265 F.2d 408. However, in order for consent to constitute a waiver the burden is on the United States to show by clear and convincing evidence that it is unequivocal and specific and freely and intelligently given. *United States v. Reckis*, supra; *United States v. Wallace*, D.C.D.C., 160 F. Supp. 859. It must be affirmatively shown that there was no duress or coercion, actual or implied."

Because Mr. Bigler was contradicted by a number of third party witnesses, his testimony could not have been "clear and convincing." The District Court's opinion was thus clearly erroneous in finding that the Government had carried its burden of proving that Mr. Selinger had consented to the examination of his records.

### **CONCLUSION**

For the reasons stated, it is respectfully submitted that the District Court's order denying appellants' motion for the return of property and suppression of evidence be reversed, and the cause remanded with instructions to enter an order to return property and suppress evidence.

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. FRAZER

**(Appendix Follows)**



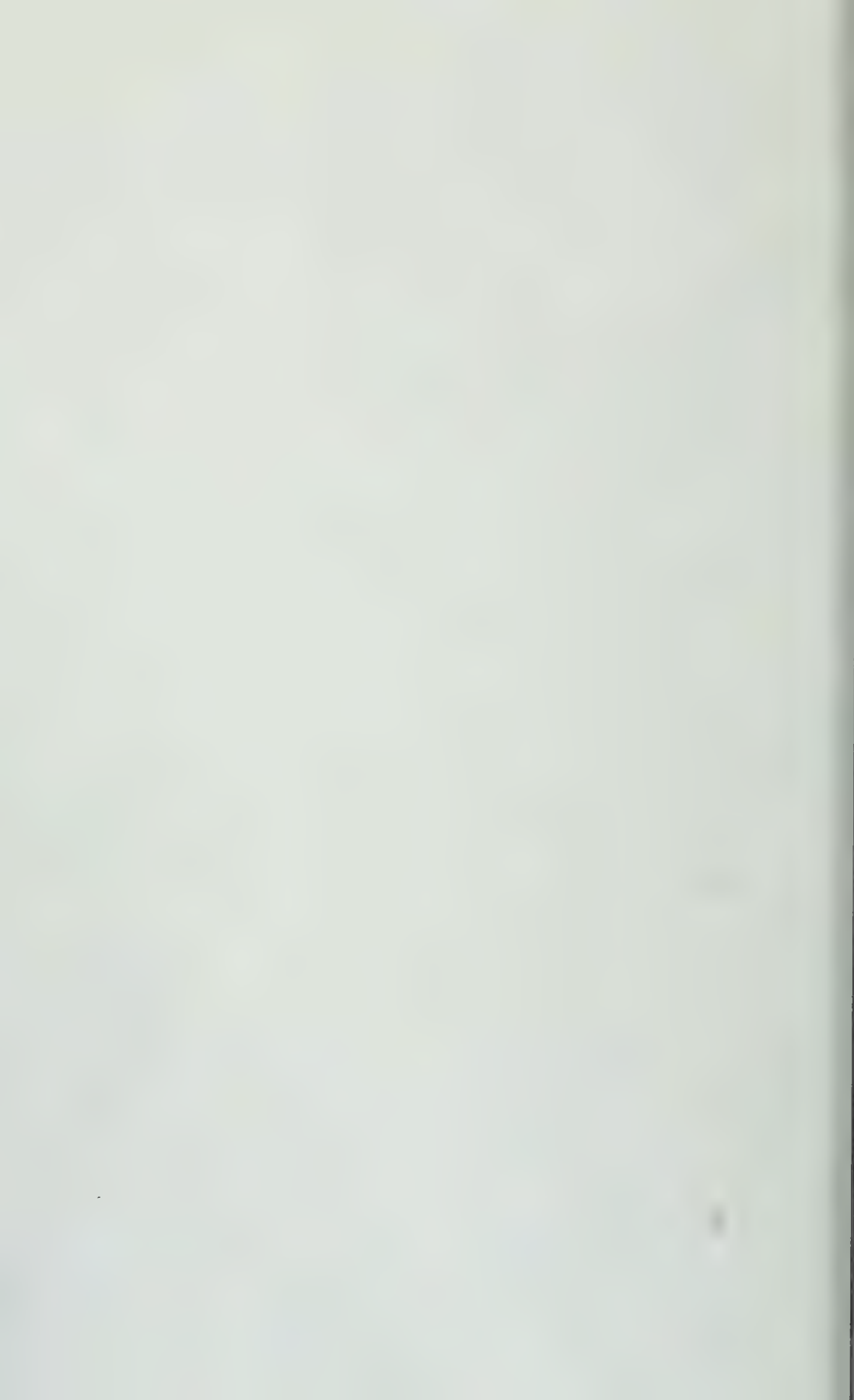




# Appendix

## TABLE OF EXHIBITS

Exhibit No.	Description	Identified	RECORD PAGE NO.		
			Offered	Received	Rejected
PLAINTIFF'S:					
1	Summons issued Nov. 12, 1965 to First Federal Savings & Loan Assoc. Chris-Town Office	Vol. V at 14	Vol. V at 14	Vol. V at 14	
2	Summons issued Nov. 17, 1965 to Southwestern Investment Company	Vol. V at 16	Vol. V at 16	Vol. V at 16	
3	Summons issued Nov. 4, 1965 to First National Bank at 24th and Indian School	Vol. IV at 23	Vol. IV at 23	Vol. IV at 24	
4	Summons issued Nov. 5, 1965 to First National Bank at 24th and Indian School	Vol. IV at 23	Vol. IV at 23	Vol. IV at 24	
5	Summons issued Nov. 2, 1965 to First Fed. Savings & Loan Sunnyslope Office	Vol. IV at 30	Vol. V at 19	Vol. V at 19	
6	Summons issued Oct. 26, 1965 to Irving Nussbaum	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
7	Summons issued Nov. 3, 1965 to Valley National Bank	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
8	Summons issued Nov. 4, 1965 to First National Bank of Arizona	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
9	Summons issued Nov. 8, 1965 to Allied Building Credits	Vol. VI at 12	Vol. VI at 14	Vol. VI at 16	
10	Copies of Sign-out Register	Vol. VI at 5			
DEFENDANT'S:					
A	Copies of sign-out register of Intelligence Division Nov. 12, 15, 16, 17 and 19 of 1965	Vol. IV at 5	Vol. IV at 5	Vol. IV at 11	



**In the United States Court of Appeals  
for the Ninth Circuit**

---

**WALTER SELINGER, APPELLANT**

*v.*

**LESTER BIGLER, Special Agent of the  
Internal Revenue Service, et al., APPELLEES**

---

**On Appeal from the Order of the United States District  
Court for the District of Arizona**

---

**BRIEF FOR THE APPELLEES**

---

**FILED**

**FEB 6 1967**

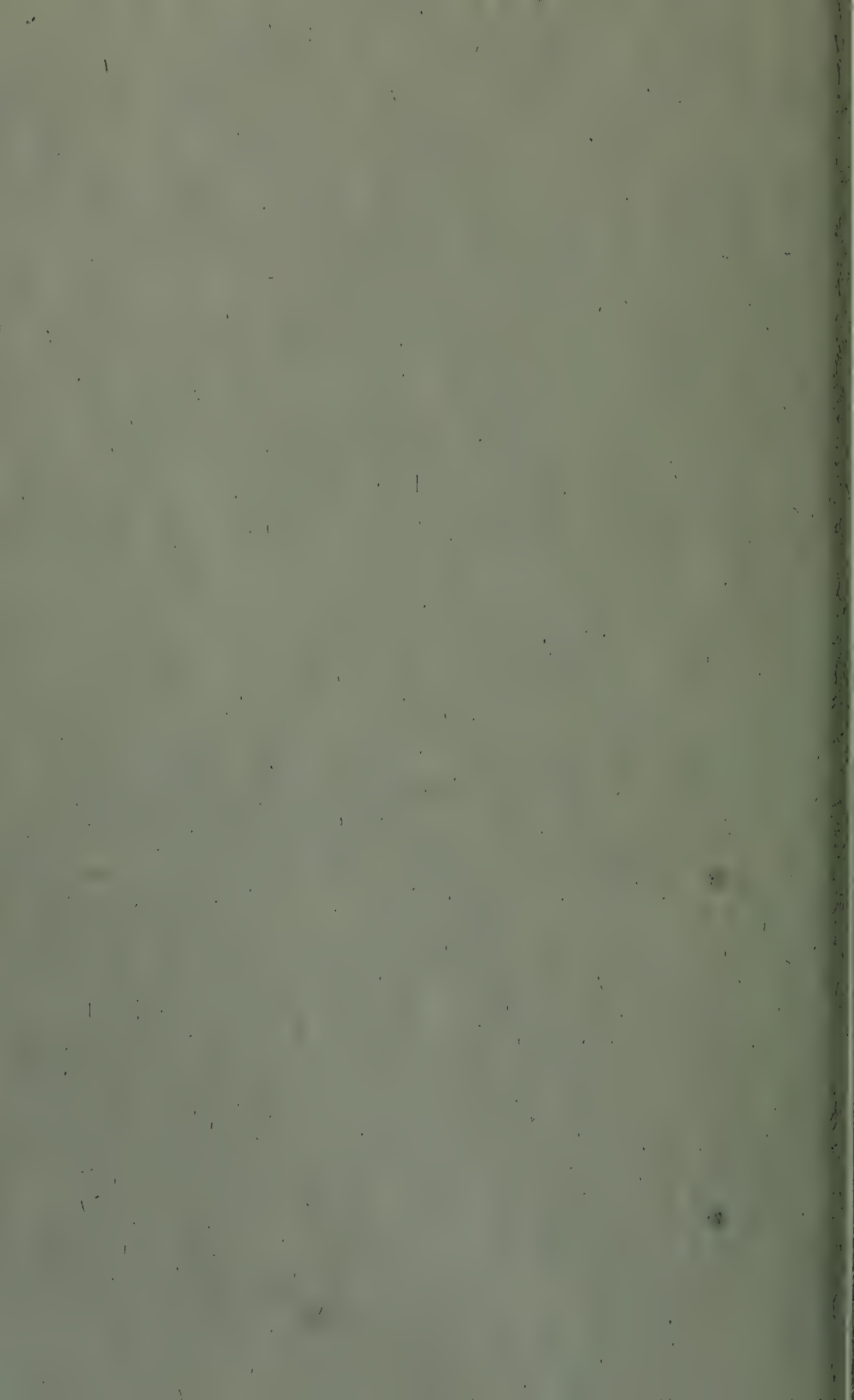
**WM. B. LUCK, CLERK**

**MITCHELL ROGOVIN,  
*Assistant Attorney General.***

**LEE A. JACKSON,  
JOSEPH M. HOWARD,  
BURTON BERKLEY,  
*Attorneys,  
Department of Justice,  
Washington, D. C. 20530.***

---





## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Constitutional Amendments involved .....	3
Statement .....	4
Summary of Argument .....	6
Argument:	
The District Court properly held that none of taxpayer's constitutional rights had been violated and was correct in denying his motion for return and suppression .....	6
A. Taxpayer had no standing to complain of the examination and photocopying of the accountant's workpapers .....	6
B. Taxpayer failed to prove that the inspection and photocopying of his books and records constituted a violation of any of his constitutional privileges .....	7
Conclusion .....	12

## CITATIONS

<i>Baumgardner v. Commissioner</i> , 251 F. 2d 311 .....	11
<i>Boren v. Tucker</i> , 239 F. 2d 767 .....	7
<i>Deck v. United States</i> , 339 F. 2d 739, certiorari denied, 379 U.S. 967 .....	7
<i>DiBella v. United States</i> , 369 U.S. 121 .....	2
<i>Fahey, In re</i> , 300 F. 2d 383 .....	7
<i>Gentilli v. Caplin</i> , decided March 3, 1964, certiorari denied, 379 U.S. 890 .....	2
<i>Goodman v. United States</i> , decided November 18, 1966 .....	2
<i>Greene v. United States</i> , 296 F. 2d 382, vacated and remanded, 369 U.S. 403 .....	7

## II

Cases—Continued	Page
<i>Hill v. United States</i> , 346 F. 2d 175 .....	2
<i>Kennedy v. Coyle</i> , 352 F. 2d 867 .....	2
<i>Kohatsu v. United States</i> , 351 U.S. 898, certiorari denied, 384 U.S. 1011 .....	7, 9, 10
<i>McGarry v. Riley</i> , 363 F. 2d 421, certiorari denied, December 5, 1966 .....	7
<i>Miranda v. Arizona</i> , 384 U.S. 436 .....	9, 10
<i>Montgomery v. United States</i> , 203 F. 2d 887 .....	7
<i>Rickey v. United States</i> , 360 F. 2d 33, certiorari denied, 385 U.S. 835 .....	9
<i>Turner v. United States</i> , 222 F. 2d 926, certiorari denied, 350 U.S. 831 .....	7
<i>United States v. Burdick</i> , 214 F. 2d 768, vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932 .....	7
<i>United States v. Gypsum Co.</i> , 333 U.S. 364 .....	11
<i>United States v. Sclafani</i> , 265 F. 2d 408, certiorari denied, 360 U.S. 918 .....	7
<i>Westside Ford, Inc. v. United States</i> , 206 F. 2d 627 .....	7
<i>Wild v. United States</i> , 362 F. 2d 206 .....	9
<i>Zamaroni v. Philpott</i> , 346 F. 2d 365, certiorari denied, 382 U.S. 903 .....	2
Constitution of the United States:	
Fourth Amendment .....	3
Fifth Amendment .....	3
Sixth Amendment .....	3
Miscellaneous:	
Peloubet, <i>Audit Working Papers</i> (1937) pp. 2-4 ....	7
Stehler, <i>Auditing Principles</i> (1956) p. 80 .....	7

**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 21,116

WALTER SELINGER, APPELLANT

*v.*

LESTER BIGLER, Special Agent of the  
Internal Revenue Service, et al., APPELLEES

---

On Appeal from the Order of the United States District  
Court for the District of Arizona

---

BRIEF FOR THE APPELLEES

---

**OPINION BELOW**

The District Court's opinion (I R. 126-132)<sup>1</sup> has not yet been reported officially.

**JURISDICTION**

This appeal involves a pre-indictment motion for the return of property and to suppress evidence. This

---

<sup>1</sup> "I R." references are to Volume I of the record, which is the court file.

motion was filed on November 16, 1965, and, after a hearing, the District Court denied it on April 27, 1966. The notice of appeal was filed on April 29, 1966, and on May 9, 1966, the District Court ordered that the Government be enjoined from examining the subject records or conducting any further investigation during the pendency of this appeal. This Court's jurisdiction has been invoked under 28 U.S.C., Section 1291.<sup>2</sup>

### QUESTIONS PRESENTED

1. Whether a taxpayer has any standing to object where his accountant has turned over his own workpapers to agents of the Internal Revenue Service.

2. Whether any of a taxpayer's constitutional privileges are violated when he has voluntarily permitted agents of the Internal Revenue Service to examine and copy his business records in the course of a tax investigation.

---

<sup>2</sup> This case contains the same questions as to the jurisdiction of the District Court and of this Court as were involved in *Goodman v. United States*, decided November 18, 1966 (No. 20,811). In view of this Court's decision in that case and denial of the Government's petition for rehearing, we do not brief these issues again. We do not, however, believe that the *Goodman* case was correctly decided, and we respectfully suggest that the complaint should have been dismissed as premature and lacking in equity, *Gentilli v. Caplin* (C.A. D.C.), decided March 3, 1964 (64-2 U.S.T.C., par. 9779), certiorari denied, 379 U.S. 890; *Zamaroni v. Philpott*, 346 F. 2d 365 (C.A. 7th), certiorari denied, 382 U.S. 903; *Kennedy v. Coyle*, 352 F. 2d 867 (C.A. 7th); and this appeal should be dismissed for want of a final order. *DiBella v. United States*, 369 U.S. 121, 131-132; *Hill v. United States*, 346 F.2d 175.



## CONSTITUTIONAL AMENDMENTS INVOLVED

## CONSTITUTION OF THE UNITED STATES:

*Fourth Amendment*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be secured, and the persons or things to be seized.

*Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Sixth Amendment*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### STATEMENT

In his pleading denominated "Motion for return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure" the appellant, Walter Selinger (hereinafter referred to as "taxpayer"), alleged that certain documents had been photographed by Special Agent Bigler and Revenue Agent Landesman, and oral statements had been made to them in violation of his rights under the IV, V and VI Amendments to the Constitution of the United States. (I R. 1-2.) This motion was supported by the affidavits of taxpayer, his accountant and his office manager. (I R. 13-20.) The court issued a temporary restraining order and set a date for hearing on this motion. (I R. 21-22.) The Government thereupon moved to dismiss the complaint for want of jurisdiction over the subject matter and for failure to state a claim. (I R. 24.) Hearing was had before the court on December 13 and 14, 1965. (II R. 1-125, III R. 1-53.)<sup>3</sup> Thereafter taxpayer moved to reopen the hearing so that his attorney could offer testimony which would be in disagreement with part of that given by Special Agent Bigler. (I R. 64-68.) This motion was opposed by the Government (I R.

---

<sup>3</sup> "II R." references are to the transcript of December 13, 1965; "III R." references are to the transcript of December 14, 1965.

80-81), but at a subsequent hearing concerning taxpayer's allegations that the Government had violated the temporary restraining order this testimony was permitted. (V R. 47-56.)<sup>4</sup>

The court considered the conflicting testimony and depositions, and found the following facts. Taxpayer was advised by Special Agent Bigler of his official position and that of Revenue Agent Landesman. (I R. 129.) He was also told that they wished to see his business records for the purpose of investigating his tax returns, although he was advised by them that he did not have to show them these records or give them any information if he did not want to do so. (I R. 129-130.) Despite this warning as to his rights, taxpayer voluntarily and without any threats or promises agreed that the agents could examine his business records. (I R. 130.) Certain business records were turned over to the agents by taxpayer's accountant, Sidney Markow, voluntarily and not as the result of any threats, coercion or misrepresentation. (I R. 130.) The records shown to the agents by taxpayer's office manager, Rudy Boehmer, were made available voluntarily by taxpayer and Boehmer did not turn them over under the pressure of threats or coercion. (I R. 130-131.)

On the basis of these facts the District Court concluded that none of taxpayer's constitutional rights had been violated, and his motion for return of the photocopies and suppression was denied. (I R. 131.)

---

<sup>4</sup> "V R." references are to the transcript of January 7, 1966, which has been numbered V in this Court's records.

## SUMMARY OF ARGUMENT

Taxpayer has no right to object to the fact his accountant let the agents examine and copy his workpapers. It is undisputed that they belonged to the accountant and were voluntarily turned over to the agents by him.

None of taxpayer's constitutional privileges were violated by the examination and copying of his business records. The District Court, assessing the credibility of conflicting testimony, found that the agents identified themselves to taxpayer, and, without any trickery or deceit being practiced upon him, taxpayer voluntarily agreed to let them examine his business records. Moreover, the agents had no duty to advise taxpayer of his right to counsel, for this was a tax investigation, in which the agents have come to no conclusion as to whether or not any crime has been committed, and taxpayer was not in custody.

## ARGUMENT

**The District Court Properly Held That None of Taxpayer's Constitutional Rights Had Been Violated and Was Correct In Denying His Motion for Return and Suppression**

***A. Taxpayer had no standing to complain of the examination and photocopying of the accountant's workpapers.***

It is undisputed that some of the records involved in this controversy are the accountant's workpapers. (II R. 65.) It is also undisputed that no special agreement as to the ownership of these workpapers



exists between taxpayer and his accountant. (II R. 42, 69-70, 79-80.) Thus, according to the ordinary accounting understanding, custom and practice in this country, these workpapers belonged to Markow and taxpayer had no right to prevent him from turning them over to the agents if he wished to do so. See, e.g., Stehler, *Auditing Principles* (1956), p. 80; Peloubet, *Audit Working Papers* (1937), pp. 2-4; *Deck v. United States*, 339 F. 2d 739, 740 (C.A. D.C.), certiorari denied, 379 U.S. 967; *In re Fahey*, 300 F. 2d 383 (C.A. 6th). As Markow admitted (II R. 77-80) and the District Court found (I R. 130), he freely and voluntarily turned these papers over to the agents. Thus no one may now question the right of the Internal Revenue Service to use these workpapers.

**B. *Taxpayer failed to prove that the inspection and photocopying of his books and records constituted a violation of any of his constitutional privileges***

It is well established that oral admissions or personal documents *voluntarily* given to an identified investigating agent of the Internal Revenue Service, which were not induced by stealth, trickery or misrepresentation, are usable by the Service for all purposes, even though the person under investigation was not warned that the investigator suspected the existence of criminal fraud. *Kohatsu v. United States*, 351 U.S. 898, 902 (C.A. 9th), certiorari denied, 384 U.S. 1011; *Greene v. United States*, 296 F. 2d 382, 384-385 (C.A. 2d), vacated and remanded on other grounds, 369 U.S. 403; *United States v. Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2d), certiorari denied, 360



U.S. 918; *United States v. Burdick*, 214 F. 2d 768, 773-774 (C.A. 3d), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932; *Turner v. United States*, 222 F. 2d 926, 930-932 (C.A. 4th), certiorari denied, 350 U.S. 831; *Montgomery v. United States*, 203 F. 2d 887, 893 (C.A. 5th).

The instant taxpayer's sole allegation is that he did not grant permission at all for the inspection of his records; the District Court, as finder of fact, chose to believe the testimony of Agents Bigler and Landesman that such permission was voluntarily granted. (I R. 130; III R. 5, 10-12, 13, 17, 21, 31-32, 37-39.) Moreover, despite taxpayer's denial, the court found as a fact that the agents had identified themselves to him in their official capacity, and that he was advised that he did not have to show them his records or give them any information. (I R. 129-130; III R. 5, 6-7, 36.) From this it is clear that taxpayer's records were not examined or photocopied in violation of the Fourth or Fifth Amendments.<sup>5</sup>

Nor is there any substance to taxpayer's argument (Br. 9-18) that the agents were required to advise him of his right to counsel. This Court, in the recent

---

<sup>5</sup> Taxpayer does not argue on appeal that the fact that the records were photographed, rather than merely examined and copied by hand, makes any legal difference. It should be noted that the First Circuit has recently held that in this modern world the right to photograph records may be inferred from the right to examine them. *McGarry v. Riley*, 363 F. 2d 421, 424 (C.A. 1st), certiorari denied December 5, 1966, 35 L. Week 3201; see also *Boren v. Tucker*, 239 F. 2d 767, 771-772 (C.A. 9th); *Westside Ford, Inc. v. United States*, 206 F. 2d 627, 634 (C.A. 9th).

case of *Kohatsu v. United States*, *supra*, specifically held that the so-called “*Escobedo* rule” does not apply in a tax investigation, because the agents are not seeking to identify a person in custody as the perpetrator of an unsolved crime, but are investigating to determine whether in fact any crime had been committed. Accord: *Rickey v. United States*, 360 F. 2d 33 (C.A. 9th), certiorari denied, 385 U.S. 835. There is no allegation that taxpayer was in custody, and it is clear from Agent Bigler’s testimony that at this point of the investigation he had not arrived at any conclusions concerning the existence of any deficiency in taxpayer’s taxes, and so *a fortiori* he had reached no conclusion as to whether or not a crime has been committed. (III R. 25.)

Taxpayer seeks (Br. 13-14) to distinguish the instant case from *Kohatsu* on the basis that here the special agent was in the investigation from the beginning, because of an informer’s letter, whereas in *Kohatsu* the special agent did not enter the investigation until the revenue agent had uncovered evidence of fraud. We submit that the source of information indicating the possibility of the existence of fraud, causing a special agent to enter an investigation, is irrelevant, and so this is a distinction without a difference.<sup>6</sup>

Taxpayer also seeks (Br. 14-18) to find support for his position from the Supreme Court’s opinion in *Miranda v. Arizona*, 384 U.S. 436. We submit that, on

---

<sup>6</sup> This Court recently had occasion to consider in some detail the functions of special agents. See *Wild v. United States*, 362 F. 2d 206.

the contrary, the entire thrust of the *Miranda* opinion was directed towards the problems facing a person suspected of committing an unsolved crime who is *in custody*. As the Court held (384 U.S. p. 478):

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is *in custody* is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. (Emphasis supplied.)<sup>7</sup>

---

<sup>7</sup> Although it is true that the denial of certiorari cannot be taken as an indication of approval by the Supreme Court of the decision below, it might be noted that the Government stated in its brief in opposition in *Kohatsu* that the Court might deem it appropriate to defer action on that petition until after it had decided *Miranda* and its companion cases, which were then under advisement, even though we believed that certiorari should have been denied regardless of what might have been decided in *Miranda*. The Court did, in fact, hold back on deciding *Kohatsu* for three months after the brief in opposition was filed, and denied certiorari in that case one week after the *Miranda* opinion was handed down.



Thus it is clear that taxpayer has no legal grounds for reversing the instant case and is really seeking nothing less than a trial *de novo*, asking this Court to reweigh the facts and to redetermine the credibility of the witnesses, contrary to the well established rules governing appellate review. See, e.g., *Baumgardner v. Commissioner*, 251 F. 2d 311, 313 (C.A. 9th); *United States v. Gypsum Co.*, 333 U.S. 364, 395. Even if this Court were to accept taxpayer's invitations to retry the case, however, we do not believe it could accept his inherently improbable tale.

For example, he testified that the agents came to see him just to meet him personally (II R. 9-10), that they did not tell him they were investigating his tax returns (II R. 10-11), and that although he was asked about his records, the agents never asked to be permitted to examine them (II R. 11-12). He also testified that although he saw his accountant in the parking lot after his interview with the agents, he merely told him to let him know if he should hear from the agents.<sup>s</sup> (II R. 36-37.) If in truth taxpayer did not want the records in his accountant's hands turned over to the agents, it is inconceivable that he would not have so stated to Mr. Markow at

---

<sup>s</sup> The accountant's original version of this conversation was that taxpayer told him that "Mr. Bigler and probably his assistant, Mr. Landesman, will contact you," and they were identified as "Internal Revenue people." (Markow deposition, p. 19.) At the trial Mr. Markow tried to "fudge" this testimony by stating that he might have misunderstood the question originally, and that at the time of the trial he could not recall exactly what had been said in the parking lot, nor would he probably have done so at the time of the deposition, either. (II R. 70-72.)

that time. Even more inconceivable is his testimony that despite his alleged upset over his accountant's cooperation with the agents, and his indication of his feelings on this matter to his office manager,<sup>9</sup> he never told the office manager not to make any records available to the agents (II R. 45, 100).

### CONCLUSION

For the reasons set forth above the order of the District Court should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,  
*Assistant Attorney General.*

LEE A. JACKSON,  
JOSEPH M. HOWARD,  
BURTON BERKLEY,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D. C. 20530.*

FEBRUARY, 1967.

---

<sup>9</sup> He claims that he told his office manager "They confiscated my records, and I am pretty disturbed." (II R. 45; II R 98-99.)



## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of February, 1967.

---

*Attorney.*



No. 21,116

In the  
United States Court of Appeals  
*for the Ninth Circuit*

---

WALTER SELINGER,

*Appellant,*

VS.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al,

*Appellee.*

---

Petition for Rehearing

---

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

10th Floor - 111 West Monroe

Phoenix, Arizona

*Attorneys for Appellant*

JUN 12 1967

FILED

MAY 24 1967



SUBJECT INDEX

	Page
Authorities Cited by Petitioner Have Been Overlooked.....	2
Application for Stay if Petition for Rehearing Is Denied.....	3

TABLE OF AUTHORITIES CITED

CASES

Kohatsu v. United States, 351 F. 2d 898 (9th Cir. 1965).....	2
Miranda v. Arizona, 384 U. S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966) .....	2





No. 21,116

In the

# United States Court of Appeals

*for the Ninth Circuit*

---

WALTER SELINGER,

*Appellant,*

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al,

*Appellee.*

---

## Petition for Rehearing

---

*To the Honorable Gilbert H. Jertberg and Charles M. Merrill, Circuit Judges, and Fred M. Taylor, District Judge, in and for the Ninth Circuit:*

Your petitioner, Walter Selinger, respectfully petitions for a rehearing of his motion to return copies of his records and suppress their use as evidence for the following reasons:

**AUTHORITIES CITED BY PETITIONER  
HAVE BEEN OVERLOOKED**

In affirming the District Court's opinion denying the petitioner's motion, this Court relied upon *Kohatsu v. United States*, 351 F. 2d 898 (9th Cir. 1965). The petitioner argued extensively in his opening and reply briefs that *Kohatsu* should be reconsidered because of *Miranda v. Arizona*, 384 U. S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). The rationale and philosophy of *Miranda* require that a special agent of the Treasury Department must inform an individual of his right to counsel before any interrogation begins. Since the rule established in *Miranda* is applicable to agents of the Federal Bureau of Investigation, as well as local law enforcement officials, the rule is equally applicable to special agents of the Treasury Department.

Because the petitioner believes that *Miranda* requires that the District Court's opinion be reversed, he respectfully urges that this Court grant his petition for rehearing so that the Court may consider the applicability of *Miranda* to his case.

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

I certify that in my judgment this petition for rehearing is well-founded, and that it is not interposed for delay.

DAVID R. FRAZER

**APPLICATION FOR STAY IF PETITION  
FOR REHEARING IS DENIED**

In the event of denial of the petition for rehearing, petitioner desires to apply to the Supreme Court of the United States for the issuance of a writ of certiorari and therefore prays for a stay of the sending of the opinion and certified copy of the judgment to the District Court for such purpose.

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

*Attorneys for Appellant*





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

---

BRIEF OF APPELLANT

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

FILED

NOV 7 1966

WM. B. LUCK, CLERK

NORTON A. KESTEN and  
LEVINSON, MARCUS & BRATTER

8500 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellant



N O. 2 1 1 1 9

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

---

BRIEF OF APPELLANT

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

NORTON A. KESTEN and  
LEVINSON, MARCUS & BRATTER

8500 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellant



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
JURISDICTION AND FACTUAL BACKGROUND	1
STATEMENT OF FACTS BRINGING CASE WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.	1
STATEMENT OF CASE	3
SPECIFICATION OF ERRORS	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I CAN APPELLANT'S INTENT TO TRANSMUTE BE FOUND IN HER TACIT APPROVAL OF THE POWERS OF MANAGEMENT CONTAINED IN THE DECLARATION OF TRUST?	7
II CAN APPELLANT'S TACIT APPROVAL TO TRANSMUTE HER COMMUNITY PROPERTY TO HER HUSBAND'S SEPARATE PROPERTY BE FOUND IN THE FACT THAT SHE MIGHT OBTAIN SOME BENEFIT UNDER THE DECLARATION OF TRUST?	16
III IS APPELLANT'S INTENT TO TRANSMUTE EXPRESSLY REFLECTED IN THE DECLARA- TION OF TRUST?	18
IV IF APPELLANT HAS TRANSMUTED HER SHARE OF THE COMMUNITY PROPERTY TO HER HUSBAND'S SEPARATE PROPERTY, WHY WAS SHE ASKED TO APPROVE SUBSEQUENT AMENDMENTS OF THE DECLARATION OF TRUST?	21
V HAVE THE ISSUES RAISED IN THIS APPEAL BEEN PREVIOUSLY AJUDICATED?	22
VI IS CASE LAW REGARDING GIFT TAXES APPLICABLE TO ESTATE TAX CASES?	31





	<u>Page</u>
VII      WHEN IS APPELLANT'S APPROVAL OF THE TRUST EFFECTIVE FOR TAX PURPOSES?	32
VIII     WAS THE TRUST VALIDLY CREATED?	36
IX        IS THE DECISION FOR THE GOVERNMENT REQUIRED TO PREVENT TAX AVOIDANCE?	46
CONCLUSION	47
CERTIFICATE	51
APPENDIX "A"	
Footnote No. 1, Civil Code, §172	A-1
Footnote No. 2, Civil Code, §172a	A-1
Footnote No. 3, Civil Code, §161a	A-2
Footnote No. 4, Civil Code, §164	A-3
Footnote No. 5, Probate Code, §201.5	A-4



# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Commissioner v. The Chase Manhattan Bank, 259 F. 2d 231, 2 A. F. T. R. 2d 6363 (5th Cir. 1958)	26-31 33, 48, 49
De Martini v. Allegretti (1905), 146 Cal. 214, 79 Pac. 871	43, 44, 45, 50
In Re Fawcett's Estate (1965), 232 Cal. App. 2d 770, 43 Cal. Rptr. 160	17
Fields v. Michael (1949), 91 Cal. App. 2d 443, 205 P. 2d 402	11
Gonzalez v. Riis (1959), 171 Cal. App. 2d 473, 340 P. 2d 1015	38
Gregory v. Gregory (1949), 92 Cal. App. 2d 343, 206 P. 2d 1122	20
Hannah v. Swift, 61 F. 2d 307 (9th Cir. 1932)	10
Kirkwood v. Bank of America (1954), 43 Cal. 2d 333, 273 P. 2d 532	12, 13, 18, 34
Lang v. Commissioner, 304 U. S. 264 (1938)	33
Lovetro v. Steers (1965), 234 Cal. App. 2d 461, 44 Cal. Rptr. 604	11
Merrill v. Fahs, 324 U. S. 888	31
Metzger v. Vestall (1935), 2 Cal. 2d 517, 42 P. 2d 67	13, 14
Mosesian v. Parker (1941), 44 Cal. App. 2d 544, 112 P. 2d 705	10
Newman v. Dore, 275 N. Y. 371, 9 N. E. 2d 966	41, 42, 50
Nichols v. Emery (1895), 109 Cal. 323, 41 Pac. 1089	37





	<u>Page</u>
Noble v. Learned (1908), 153 Cal. 245, 94 Pac. 1047	43
Rickenberg v. Commissioner of Internal Revenue, 177 F.2d 114 (9th Cir. 1949)	33
Ringrose v. Gledall, 17 Cal.App. 664, 121 Pac. 407	40, 49
Sanderson v. Niemann (1941), 17 Cal.2d 563, 110 P.2d 1025	9
Estate of Sanford v. Commissioner, 308 U.S. 39	31
Schindler v. Schindler (1954), 126 Cal.App.2d 597, 272 P.2d 566	14, 15, 16
United States v. Goodyear, 99 F.2d 523 (9th Cir. 1938)	32, 48
United States v. Stewart, 270 F.2d 894, 4 A.F.T.R. 2d 2026 (9th Cir. 1959), reh. den. 4 A.F.T.R. 2d 6075	22-25, 33, 48, 49
Vai v. Bank of America National Trust & Savings Assn. (1961), 56 Cal.2d 329, 364 P.2d 247, 15 Cal.Rptr. 71	20, 21

### Statutes

#### California Civil Code:

§155	17
§161a	15, A-2
§164	16, A-3
§172	9, 10, 32, 47, A-1
§172a	9, 10, 47, A-1
§174	17
§242	17
§2221	38



California Probate Code:

§50 45, 50

§201 45

§201.5 46, A-4

Internal Revenue Code:

§2036 32, 35, 36

§2038 32, 35, 36

Revenue and Taxation Code:

§13551 13

§13552 13

§13554 12, 13

Title 28, United States Code §1291 2

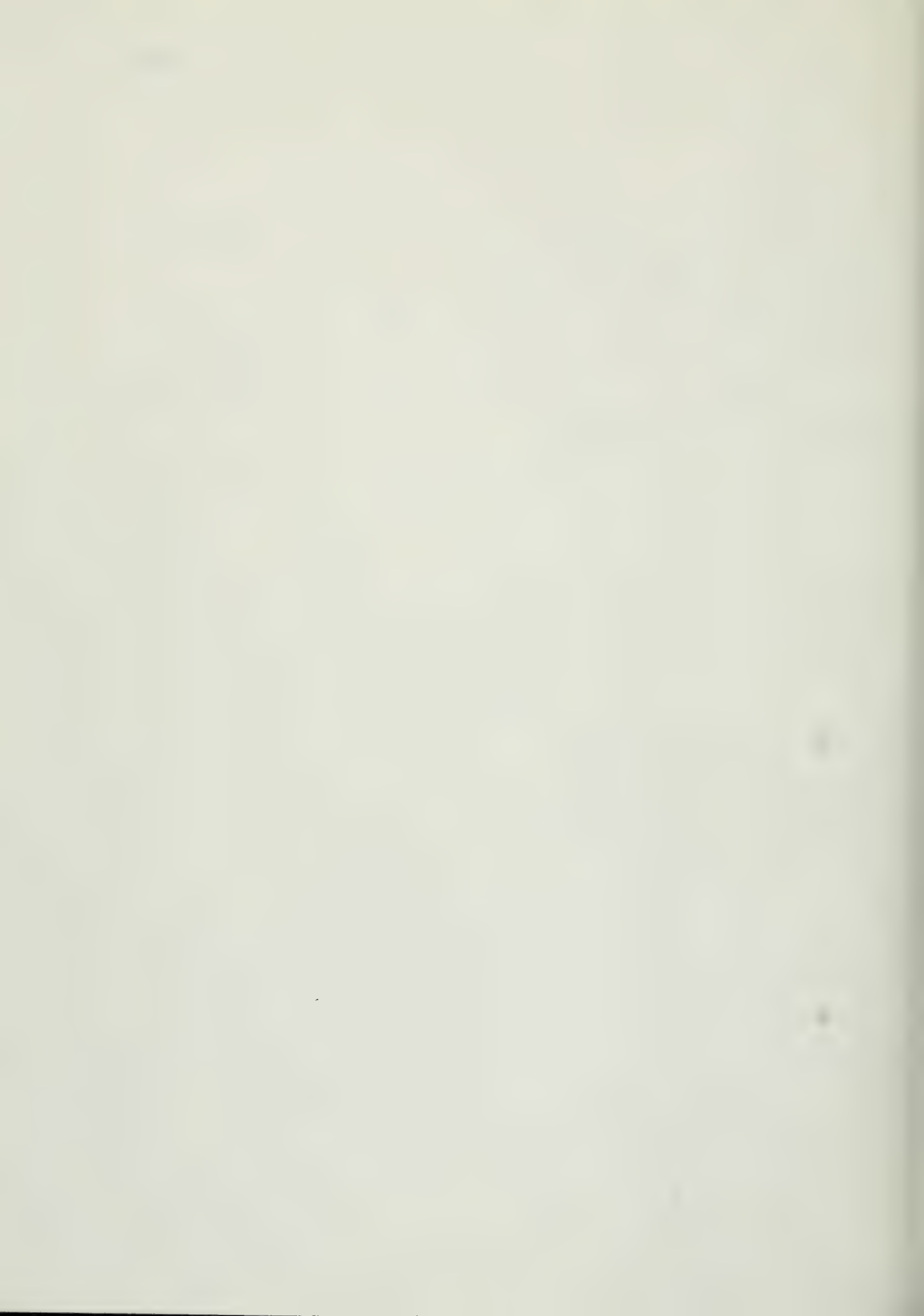
Title 28, United States Code §1346(a)(1) 2

Texts

54 Am. Jur. 30, Trusts §13 39

54 Am. Jur. 47, Trusts §35 40

48 Cal. Jur. 2d 657, Trusts §6 39



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

---

BRIEF OF APPELLANT

---

JURISDICTION AND FACTUAL BACKGROUND

STATEMENT OF FACTS BRINGING CASE  
WITHIN THE JURISDICTION OF THE UNITED  
STATES DISTRICT COURT FOR THE SOUTH-  
ERN DISTRICT OF CALIFORNIA AND THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT.

---

Plaintiff and LEROY J. KATZ were married on or about September 5, 1916, and from that time until the death of LEROY J. KATZ on February 27, 1960, remained husband and wife. That on or about August 24, 1956, a Trust was created wherein LEROY J. KATZ was the Trustor and Title Insurance and Trust Company was the Trustee. Thereafter, on May 5, 1957, and on October 31,





1958, said Trust was amended by Title Insurance and Trust Company and as amended, was in effect when LEROY J. KATZ died.

That subsequent to his death and within the time required by law, a Federal Estate Tax return, Form 706 was prepared and filed with the District Director of Internal Revenue at Los Angeles, California. Following the filing of said return, a Federal Estate Tax examiner determined that a deficiency in said tax existed. The deficiency was paid as assessed, and on June 28, 1963, plaintiff made claim for refund on Internal Revenue Service Form 843, which claim was disallowed. Thereafter, plaintiff filed suit for refund in the District Court of the United States, Southern District of California, Central Division. Cross-motions for Summary Judgment were brought and on February 11, 1966, judgment was entered for the United States of America dismissing plaintiff's complaint with prejudice. Thereafter, and on or about April 5, 1966, plaintiff filed a Notice of Appeal to this Court.

Jurisdiction of the United States District Court for the Southern District of California, Central Division is conferred under Title 28, U.S.C. Section 1346(a)(1). A reference is made to Findings of Fact No. 1 by the District Court.

Jurisdiction to hear this appeal is conferred upon the United States Court of Appeals for the Ninth Circuit by Title 28, U.S.C. Section 1291.



## STATEMENT OF CASE

Plaintiff contends that the additional tax assessed by the defendant, was erroneous in that only one-half of the corpus of the Trust is taxable in the Estate of the decedent, LEROY J. KATZ. The defendant contends that all of the corpus of the Trust is taxable in the Estate of the decedent. The parties agreed, for purposes of the cross-motions for summary judgment, and the trial Court found, that prior to the execution of the Declaration of Trust, the property placed therein was the community property of the decedent and the plaintiff. Reference is made to Finding of Fact No. 10 and Conclusion of Law No. 5. The Trust was established by Title Insurance and Trust Company, by Declaration dated August 29, 1956, which Declaration states that LEROY JOSEPH KATZ, a married man is Trustor. See recitals in Declaration of Trust, I and II, that the Trust was created by the Trustor for the benefit of his wife SADIE KATZ, his children EVELYN JEAN KATZ KLIMAN, and JOSEPH PHILLIP KEITH, the surviving spouses of the Trustor's children, if any, and the surviving issue of his children, as in the Trust more fully provided. SECTION FOUR of the Trust provides,

"During the lifetime and competency of the Trustor, the Trustee shall have no rights, duties or powers with respect to any property held under this Trust, it being understood that the Trustor retains all such rights and shall collect, receive and disburse without



accounting to the Trustee or any other person, all income of every nature and description from the real and personal property held hereunder. "

SECTION THIRTEEN of the Trust provides,

"The right if reserved unto the Trustor to revoke, terminate or amend this Trust in whole or in part, at any time or from time to time, by written request therefor, addressed and delivered to the Trustee, provided, however, that no such amendment shall effect the duties, liabilities or compensation of the Trustee, without its written consent. "

Under the heading, "Approval of Wife," SADIE KATZ signed the following statement: "I, SADIE KATZ, wife of the Trustor, do hereby fully approve the foregoing Declaration of Trust, No. PP-13003, Dated August 24, 1956. Signed: SADIE KATZ. "

Thereafter, on May 5, 1957, and October 31, 1958, the Trust was amended pursuant to Article XIII of the Trust and SADIE KATZ signed each of the amendments under the heading, Consent of Trustor's Wife to Partial Amendment, "I, SADIE KATZ, Trustor's wife, do hereby consent to and fully approve of the foregoing partial amendment to Title Insurance and Trust Company's Declaration of Trust, No. PP-13003, and agree to be bound by the provisions thereof. Dated at Los Angeles, California, April 27, 1957. Signed: SADIE KATZ. " and the same statement, dated at Los





Angeles, California on October 27, 1958 and signed by Appellant.

Appellee contends and the Court found, that the legal effect of the approval of SADIE KATZ of the Declaration of Trust, was to part with her interest in the community property transferred to the Trust and to transmute the property of the Trust into the separate property of the Trustor. Reference is made to Finding of Fact No. 10 and No. 11 and Conclusions of Law, No. 3 and No. 5.

Appellant contends that her approval of the trust instrument was not a consent, tacit or express, to a transmutation of her community property to the separate property of her husband. In the alternative, appellant contends that the transfer of the community property of the decedent and appellant did not constitute a transmutation of that property into the separate property of the decedent, because the approval of Appellant of the trust was not a consent to any such transmutation but merely an acknowledgment of her awareness of the terms of the trust instrument and an agreement that as to third persons dealing with the trust she did forego her right to rescind conveyances of real property.

As a further alternative, Appellant contends that the transfer of community property to the trust was avoidable as to her one-half interest therein because made without the advice of independent counsel, and that until cured by her failure to take against the trust after the death of her husband, her share of the property transferred retained its community property character and she remained the owner thereof.



As a further alternative, Appellant contends that the Trust is illusory because the rights retained by the Trustor were so complete that there never was a valid Trust created and that the Trustee received only a bare legal title to the property as the agent of the community.

### SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. In finding that there was an intent to transmute the Appellant's community property either tacitly or expressly.
2. In its application and interpretation of prior case law.
3. In finding that appellant's approval was effective upon creation of the trust.
4. In finding that the trust was valid.

### SUMMARY OF ARGUMENT

No intent to transmute Appellant's community property to her husband's separate property can be found tacitly or expressly in the Declaration of Trust.

The issues raised in this case have been previously adjudicated and a proper application of those decisions require a decision for the appellant.

In the alternative, appellant contends that the attempted



creation of the trust was ineffective.

Under either contention, Appellant's property is not subject to taxation in her husband's estate.

### ARGUMENT

The position taken by the Appellee and that adopted by the District Court was that the Appellant assented to a transmutation of community property to her husband's separate property. All parties to this appeal apparently concede that an intent to transmute is necessary.

Just where this intent to transmute is legally disclosed is not clear. Appellant assumes that any such manifestation of intent is predicated upon either (1) Appellant's tacit approval of the benefits she derived from the trust, or (2) her express approval of the terms of the trust instrument.

Appellant will examine each contention.

#### I

CAN APPELLANT'S INTENT TO TRANSMUTE  
BE FOUND IN HER TACIT APPROVAL OF  
THE POWERS OF MANAGEMENT CONTAINED  
IN THE DECLARATION OF TRUST?

---

It has been the position of Appellant throughout this matter that all of the property of LEROY J. KATZ, decedent and Appellant





was community property. The Court in its Findings of Fact and Conclusions of Law on Defendant's Motion for Summary Judgment (Finding of Fact No. 10, page 3, lines 12 to 15) indicates that the Court assumed that the trust res was community property.

Appellant urges that no tacit assent to a transmutation can be found as a matter of law from her acquiescence to the extensive powers of management reserved in the Trustor (LEROY J. KATZ) during his lifetime. Appellant adopts this argument because of the fact that the powers of management which the Trustor exercised were in fact only reflective of his rights to manage the community property of the community and in fact those same powers were imposed upon him by statute.

To establish this point, Appellant directs attention to Paragraph IV of the Declaration of Trust:

"During the lifetime and competency of the Trustor, the Trustee shall have no rights, duties or powers with respect to any property held under this trust, it being understood that the Trustor retains all such rights, and shall collect, receive, and disburse, without accounting to the Trustee or any other person, all income of every nature and description from the real and personal property held hereunder."

The pertinent sections of the California Civil Code dealing with those same rights, as they apply to a husband under



community property law are as follows:

"Except as provided in Section 172b, the husband has the management and control of the community personal property with like absolute power of disposition. . . ." (Emphasis added) (Footnote 1 to appendix).

California Civil Code, Section 172.

"Except as provided in Section 172b, the husband has the management and control of the community real property. . . ." (Emphasis added) (Footnote 2 to appendix).

California Civil Code, Section 172a.

"Although under the provisions of Section 161a, Civil Code, the husband and wife have an equal interest in the community property during the continuance of the marriage relation, they do not possess equal powers of management, control of disposition thereof. [Citations]. The husband has the management and control of the community property. . . ."

Sanderson v. Niemann (1941), 17 Cal.2d 563,  
110 P.2d 1025.

"In accordance with the provisions of Sections 161a, 172 and 172a of the Civil Code, the respective



interests of the husband and wife in community property are existing and equal, subject to the very dominant right of the husband to manage and control such property. "

Mosesian v. Parker (1941), 44 Cal. App. 2d 544,  
112 P. 2d 705.

By way of comparison, Paragraph IV of the Declaration of Trust establishes an unfettered control of the trust res by the Trustor (LEROY J. KATZ). California Civil Code, Sections 172 and 172a give him (as husband) the exclusive right to manage and control the community property. It is submitted that the rights created by virtue of the Declaration of Trust in the Trustor and those created by statutory authority pursuant to the California Civil Code Sections 172 and 172a are, in fact, the same.

This Court has previously had the opportunity to express the husband's position relative to control of the community property in California.

"It is sufficient to say that the Courts of California have decided that the community property of the husband and wife is subject to community debts and that the management and control thereof is vested in the husband by the law of California as declared by the state legislature and by the Courts. [Citations]. "

Hannah v. Swift (1932), 61 F. 2d 307.

Likewise, more recent California cases have maintained the





husband's rights of management and control.

"The position of the husband, in whom the management and control of the entire community estate is vested by statute, Civil Code Sections 161a, 172, 172a, has been frequently analogized to that of a partner, agent or fiduciary. [Citations]."

Lovetro v. Steers (1965), 234 Cal. App.2d 461,  
44 Cal. Rptr. 604.

In addition to the fact that the husband has control and management of the community, it is interesting to note that a wife's action to set aside conveyances and transfers by a husband during his lifetime are considered to be opposed to the public policy of the State of California.

"If she could not then have maintained an action against him for the value of her interest in the property which he had given away, it would have been due to the policy of the law to forbid vexatious and unnecessary litigation between spouses, and also upon the ground that during the existence of the marriage the husband has the control and management of the community property of which he cannot be divested except through procedure authorized by statute."

Fields v. Michael (1949), 91 Cal. App.2d 443,  
205 P.2d 402.



The trial Court has cited three California cases in support of the proposition that Appellant's approval constituted her consent to the transmutation of her community property to her husband's separate property (Conclusion of Law No. 3, page 4, lines 10-18).

It is first to be noted that the "approval" referred to by the trial Court might be either a form of tacit approval found by virtue of the benefits derived by Appellant, or from the written approval signed by Appellant and affixed to the Declaration of Trust.

Assuming that it is the former, Appellant urges that the trial Court erred in its interpretation of the cases relied upon by it to reach its conclusion.

In relying on the case of Kirkwood v. Bank of America (1954), 43 Cal.2d 333, 339-340, 273 P.2d 532, the trial Court failed to take into consideration that the taxing statute under construction in that case, Section 13554 of the Revenue and Taxation Code, deals with inter vivos transfers of community property.

The section at the time of the Kirkwood case provided as follows:

"Where community property is transferred within the provisions of Chapter IV of this part, other than by will or the laws of succession from one spouse to the other:

"(a) One half of the property transferred is subject to this part, if the wife is the transferee.

"(b) None of the property transferred is subject to this part if the husband is the transferee."



Thus, the Court in Kirkwood, found that the taxation of community property which had been transferred under a valid inter vivos trust, from the husband to the wife, was to be taxed under the provisions of Section 13554. It did not find that the property was to be taxed as separate property. The difference between the contention of the taxpayer and the Inheritance Tax Appraiser in that case, was as to which method of valuation of the wife's community property interest should be used.

Thus assuming, arguendo, that Appellant made a transfer of her community property interest in approving the trust in this case, the decision in Kirkwood would serve to establish that the interest which she received for that transfer was community property, which under the California Inheritance Tax, a succession tax, was accorded treatment different from transfers upon the death of the husband where the surviving wife elects to take under a Will of her husband in which he disposes of the entire community property (Revenue and Taxation Code, Section 13552) or where the husband disposes of only his one-half of the community property (Revenue and Taxation Code, Section 13551).

In upholding the Inheritance Tax Appraiser's determination, of the tax upon the community property, the Court is saying that the community property interests which the husband and wife received upon the inter vivos transfer to the trust, were to be taxed in accordance with the statutory rules applicable to that type of community property.

Metzger v. Vestall, 2 Cal.2d 517, 522-523 (1935), 42 P.2d





67, is the second case cited in favor of the finding that there was a transmutation. This is a case dealing with a wife's express consent to a series of legal instruments all of which had the effect of transferring certain community property interests to the son of the transferors. The Court in the Metzger case found there was consideration for such transfers, but arguendo, and by way of dicta, pointed out that one transferor signed a series of legal instruments illuminating her intent. But, the major distinction is and the Court so found that,

" . . . the division of the corporate stock at the inception of the corporation was in accordance with an oral agreement or undertaking among the parties that such division should be made in consideration of the spouses transferring to the corporation their community property. . . ." (Emphasis added)

The Findings of Fact and Conclusions of Law signed by the District Court recite in Finding of Fact No. 9, page 3, lines 3 through 9, that there was no underlying oral agreement in the case at bar.

It is therefore to be noted that the Metzger case is not authority for the proposition that the Appellant agreed to transmute.

The third case relied upon the Findings by the District Court was Schindler v. Schindler. The opinion in this case succinctly states:

"The sole question presented on this appeal is



whether the trial court properly determined that the real property was in fact community property and therefore subject to disposition in the divorce proceedings. "

Schindler v. Schindler (1954), 126 Cal. App.2d 597,  
604, 272 P.2d 566.

The alleged transmutation in this case was that the wife agreed to the transfer of her separate property community property. Manifestly this must be distinguished from a transmutation from community property to separate property because of the fact that the wife in California retains vested rights and interests in the community property.

California Civil Code, Section 161a clearly establishes that Mrs. Schindler had present rights in the community property, and did not divest herself of the opportunity to be awarded a portion of the community property.

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests. . . ."

California Civil Code, Section 161a. (footnote 3  
to appendix).

In the case at bar, Appellant would have had no such rights under Civil Code, Section 161a (if there was an effective transmuta-



tion) because there would then be no community property to divide.

It would appear reasonable to assume that the public policy of California is illustratively set forth in the California Civil Code, Section 164 (Footnote 4 to appendix) relating to the presumptions of property being community property and manifests the intent to protect a vested interest of the wife in the community. The Schindler case is not inconsistent with this position since the alleged transmutation was from separate to community property. However, Appellant is being charged with a total divestment of the community property now constituting the trust res. It is submitted that it was error to project a case dealing with the retained interests of a spouse in the community property to a situation where no such rights are found to exist.

## II

CAN APPELLANT'S TACIT APPROVAL TO  
TRANSMUTE HER COMMUNITY PROPERTY  
TO HER HUSBAND'S SEPARATE PROPERTY  
BE FOUND IN THE FACT THAT SHE MIGHT  
OBTAIN SOME BENEFIT UNDER THE DE-  
CLARATION OF TRUST?

---

Appellant contends that the applicable sections of the California Civil Code create a responsibility in the husband to support his wife and the benefits derived by Appellant are no greater than her statutory rights. Therefore, it is not consistent to find that she impliedly consented to divesting herself of considerable interests in the community property in an attempt to acquire rights of





support which she was the beneficiary of without recourse to such transmutation.

California law is quite explicit on this point.

"Husband and wife contract towards each other obligations of mutual respect, fidelity and support."

California Civil Code, Section 155.

"If the husband neglects to make adequate provisions for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband."

California Civil Code, Section 174.

"Every man shall support his wife and his child and his parent when in need. The duty imposed by this section shall be subject to the provisions of Sections 175, 196, and 206 of the Civil Code."

California Civil Code, Section 242.

"The right of a wife to support from her husband arises from the marriage relationship and continues during its existence."

In Re Fawcett's Estate (1965), 232 Cal. App. 2d 770,  
43 Cal. Rptr. 160.



### III

#### IS APPELLANT'S INTENT TO TRANSMUTE EXPRESSLY REFLECTED IN THE DECLARA- TION OF TRUST?

---

The Declaration of Trust which is the subject of this litigation indicates on page I that the Trustor is LEROY J. KATZ, a married man. The last page of the Declaration of Trust has the following language:

##### "APPROVAL OF WIFE

"I, SADIE KATZ, wife of the Trustor, do hereby fully approve the foregoing Declaration of Trust No. PP-13003.

"Dated: Aug. 24, 1956

"s/ Sadie Katz  
SADIE KATZ"

Appellant contends that the most reasonable interpretation of the foregoing language is that she approved the Declaration of Trust as to form, and that such language does not reflect Appellant's intention to transmute her share of the community property to her husband's separate property by signing the approval above quoted.

In the Kirkwood case, which the trial Court cites, the Court at page 340, states, " . . . she [the Trustor's wife], with the advice of counsel, signed a formal consent to 'all of the terms and conditions' of the 'Trust Agreement' " (Emphasis added).

Notwithstanding this, the trial Court found that the "necessary legal effect" of the Declaration of Trust was to effect a



transmutation (Conclusion of Law No. 3, page 4, lines 12-14).

Appellant urges that the intent to transmute cannot be found in the benefits derived by her. If, in fact, the trial Court found an express intent to transmute, it could have only been found in connection with the "approval" signed by Appellant. If this is the case, Appellant contends that she should have been represented by independent counsel.

Finding of Fact No. 7, page 2, lines 21 to 24, indicates that Appellant was represented by counsel.

This finding is not supported by the evidence and is not correct. A reading of the Declaration of Trust indicates that the declarant and Trustor was LEROY J. KATZ. The attorney who signed the Declaration of Trust has typed beneath his name these words, "ATTORNEY FOR TRUSTOR". Nothing in the Declaration suggests that Appellant was represented by independent counsel.

By way of illustration of this point, Appellant wishes to develop the analogy of what her rights would have been in attempting to seek a portion of the trust res if a divorce action had been filed by her subsequent to the Declaration of Trust.

If Appellee's position is correct, it would follow that Appellant would be totally foreclosed from obtaining any portion of her share of the former community property.

Most California cases which have dealt with a wife's right to independent counsel have been actions which have been brought by the wife to set aside a property settlement agreement or a default judgment of divorce.





"While it frequently occurs in negotiations between husband and wife for settlement of property matters that one attorney serves both parties, it has been said 'that in fairness to both parties concerned, when negotiations for settlement of property matters between husband and wife are on hand, both parties should at all times be represented by counsel. '

[Citations]"

Gregory v. Gregory (1949), 92 Cal. App.2d 343,  
206 P.2d 1122.

California has apparently even gone beyond the mere necessity of independent counsel. An interesting California case in this area is Vai v. Bank of America National Trust & Savings Assn. (1961), in which it is stated:

"Manifestly, the fiduciary duties and rules governing their performance by a husband should be no fewer or less rigorous than those imposed upon business partners. To hold, as defendant urges, that if a wife employs able counsel upon whom she relies in negotiating a property settlement agreement in conjunction with her action for separate maintenance, that her husband is thereby released from any fiduciary duties in respect to her interest in the community property, would put a wife in a far less protected position than a partner whose partnership is



being dissolved. It would 'permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing known to the law.' [Citations]"

Vai v. Bank of America National Trust & Savings

Assn. (1961), 56 Cal.2d 329,

364 P.2d 247, 15 Cal. Rptr. 71, 77.

This Appellant wishes to impress the use by Justice White of the term "able" as it qualifies the word "counsel". Not only is the necessity for independent counsel presumed in the Vai case (which deals with the validity of a property settlement agreement) but the additional qualification of able counsel is present.

#### IV

IF APPELLANT HAS TRANSMUTED HER  
SHARE OF THE COMMUNITY PROPERTY TO  
HER HUSBAND'S SEPARATE PROPERTY, WHY  
WAS SHE ASKED TO APPROVE SUBSEQUENT  
AMENDMENTS OF THE DECLARATION OF TRUST?

---

The Declaration of Trust is dated August 29, 1956. On



May 5 of 1957 and October 31, 1958, amendments were drafted and executed by the Trustor, Title Insurance and Trust Company, and Appellant.

The necessary force and effect of the trial Court's position is that on August 29, 1956, the Appellant transmuted all of her interest in the trust res. It would follow then that there would be no need for her to approve of subsequent amendments - the necessary effect of the Declaration of Trust being to negate any rights she had to the trust res and the need to approve any further disposition.

## V

### HAVE THE ISSUES RAISED IN THIS APPEAL BEEN PREVIOUSLY AJUDICATED?

---

The trial Court's finding (Finding of Fact No. 11, page 3, lines 16-23) is contrary to a prior decision of this Court. In the case of United States v. Stewart, 270 F.2d 894, 4 A.F.T.R.2d 2026 (9th Cir. 1959), rehearing denied per curium, 4 A.F.T.R.2d 6075, this Court considered precisely the same issue as that involved in this case regarding the rights retained by a wife, in insurance policies and annuities purchased with community funds. In the Stewart case, husband and wife were California residents. At the time of the wife's death, there were 26 insurance and annuity policies on the life of the husband, and 7 annuity policies naming the wife as annuitant. The premiums on all of the policies





were paid with community property funds.

The two questions presented to the Court were,

" . . . (1) whether one-half of the cash value of the 26 policies on the life of the husband was properly includable in the wife's gross estate; and (2) whether all, or one-half, of the proceeds of 5 of the annuity policies in the name of the wife, should be included.

"The question of whether the interest of the wife in her husband's life insurance policies is includable in her estate for tax purposes is determined by the state law of community property [Citations]. Under California law where policies are taken upon the husband's life during coverture, and premiums are paid from community funds, the policies are community property [Citations]."

In its analysis of the insurance policies to determine whether substantial interest therein passed from the wife to the husband, upon the wife's death, the Court found that with respect to 7 of the 26 policies, the husband retained the right to change the beneficiaries, to obtain the cash surrender value and the wife did not consent to the designation of beneficiaries.

With respect to 13 of the policies, the husband retained the right to change beneficiaries and to obtain the cash surrender value, but the wife endorsed the designation of beneficiaries or the mode of settlement.



With respect to two annuity policies, the wife made no endorsement and the husband retained the right to change beneficiaries, but he relinquished the right to obtain cash value. He did, however, retain the right to alter the mode of settlement and to elect to have the policy mature, i. e., to begin to receive monthly installments at an earlier date.

With respect to 4 annuity policies which had matured at the time of the wife's death, pursuant to the settlement agreements, the value of the policies was to be paid in 240 equal monthly installments. The husband was named as first beneficiary, the wife, the second, and others were named as subsequent beneficiaries.

With respect to 3 of these policies, the wife had consented to earlier settlement agreements which were revoked by the husband prior to his execution of the settlement agreement in effect when the wife died. The wife did not sign the settlement agreements which were in effect at her death. With respect to the fourth annuity contract, the husband and wife joined in the settlement agreement.

Referring to the last annuity policy, the Court says:

"In any event, the wife's endorsement did not, in our opinion, constitute a surrender of her interest in the policy. Such a holding would mean that the payments coming to the husband under this contract would be his separate property rather than community property.

"We cannot presume that the wife so intended.

. . . It is one thing to hold that a wife's consent to a



beneficiary designation on an insurance policy on the husband's life, means that she gave up her interest in the proceeds of the policy after her husband's death. It is quite another to say that the husband and wife are making a gift of their community interests in the annuity contract when they join in a settlement agreement which has the effect of insuring that the community or the survivor thereof, will receive the annuity payments as long as either is alive. "

The holding of the Court in the Stewart case as to each of the types of contract, i. e., insurance or annuity, and whatever the action of the wife in consenting or not consenting, in joining or not joining, and whatever the interests retained by the husband, whether all or partial, that in each case, is one-half of the value of the contract at the wife's death, was includable in her estate. She retained valuable rights in each contract which passed to her husband upon her death.

The Finding of Fact No. 11 and Conclusion of Law No. 5 (reference is made to page 3, lines 16-23 and page 5, lines 22-25, respectively) the last sentence of which Conclusion of Law is as follows:

"The present holding is based on the powers as aforesaid expressly granted to the husband by the Trust instrument and conferred upon him by plaintiff as a result of her consent and approval. "





is contrary to the decision of the Fifth Circuit in the case of Commissioner v. The Chase Manhattan Bank, 259 F.2d 231, 2 A.F.T.R. 2d 6363 (5th Cir. 1958). That case involved the collection of gift taxes for gifts alleged to have been made by the wife of her share of community property by her acquiescing in the benefits of three trusts, an insurance trust, a living trust and a testamentary trust, established by her husband. The contentions of the parties as set forth in the opinion of the Court, were as follows:

"The Commissioner held that on Daniel's death (the husband) the living trust and insurance trust became irrevocable and the testamentary trust came into being. . . .

"(2) As to the living trust, the Commissioner held that it became a completed gift by husband and wife when Daniel died without having exercised his right of revocation. (3) Section 86.2(a) of Treasury Regulations 108, specifically covers insurance payable revocably to a third person and purchased with community funds. The Commissioner held that on the husband's death, there was a gift by the wife of one-half of the amount of the proceeds of the insurance."

Chase Manhattan Bank contended:

". . . that Marie (the wife) had made no taxable gifts; but if she had, that the Commissioner's measure of each gift should be reduced by the value of the life



estate she received in her husband's one-half of each trust. . . . (2) As to the living trust and (3) insurance trust, Chase insisted that Marie had no community interest at the time of Daniel's death; her community interest was transferred when the trusts were created in 1928. As in the case of the testamentary trust, Chase claimed that Marie's transfers were 'business transactions . . . for her own benefit.' "

In discussing the life insurance trust, the Court states:

"In a community property state where insurance on the husband's life is purchased with community funds, payable revocably to a third person beneficiary, the husband's right to change the beneficiary and all other control over the property are held as agent of the community. The bundle of rights in the policy are owned by the community. Something happens to this bundle when the insured dies, thereby terminating his control over the property and bringing the community to an end. What happens is, that the community's property interests in the policy-rights are transformed into the beneficiary's rights to the proceeds. It is a shift in control and a shift of beneficial interests. This is the transfer that is taxed.

"Up to the time of his death, Daniel, as managing agent of the community, had the right to change



beneficiaries. When he died without exercising this right, the transfer to the Trustee was a completed gift from the community; one-half therefore should have fallen in the taxable estate of the deceased husband. The other half is a taxable gift from the surviving spouse.

"Under the terms of the Trust Agreement, Marie was the income beneficiary for life. Accordingly, the measure of her gift was half of the amount of the proceeds less a life estate in that half."

In discussing whether the rights received in the inter vivos trust by the husband as sole trustor were separate or community property, the court states:

"It must be borne in mind that Daniel (the husband) did not create the Trust. The community created it. Any rights that were reserved in the settlor were rights held by the community. Newman (referring to Newman vs. Dore, 1937, 275 N. Y. 371, 9 N. E. 2d 966) exercised control over his trust property for himself; Daniel's control (in his case restricted to the right of revocation and modification) could be exercised only as agent for the community." (Emphasis supplied by the Court).

In deciding upon the validity of the living trust, the Court





says:

"We hold that the Moran living trust was not ambulatory; it was a present, valid trust created in 1928. Marie is the income beneficiary under the express terms of that trust and not because she received the income in exchange for relinquishing her half of the community as part of the assumed election to accept the benefits of the trust."

Summarizing its holding, the Court says:

"Our holding does not mean that gift tax consequences attached at the time the trustee took title in 1928. In the transfer of property valid under State law, State law focuses on title. The Federal Gift and Estate tax law focuses on the transfer of the beneficial enjoyment of the property. One who creates a trust during his lifetime, even though he reserves a life estate, parts with legal title to the Trustee and grants to the beneficiaries (including remaindermen) an immediate equitable title. Transfer of the possession and enjoyment of the property may be deferred until some future time. It is this very situation that causes the application of the Gift and Estate Tax laws. Treasury Regulation 108, Section 86.3, provides therefore: 'A gift (for tax purposes) is incomplete in every instance where a donor reserves the power to



revest the beneficial title to the property in himself. '

"The taxable incident is the shifting of the beneficial enjoyment in the trust property, no matter when title is vested.

"Since Daniel retained the power of revocation (for the community), there was no taxable gift until the shift in beneficial enjoyment at his death. [Citations]

"When Daniel died the trust became irrevocable. His community one-half should have been included in his gross estate under Section 811(c) and 811(d) of the 1939 Code, and Marie made a taxable 'gift' of the other half under Treasury Regulations, Section 86.2 and 86.3 less her retained life estate in such half.

"Had Daniel been acting for himself instead of for the community, and had the right of revocation been retained by him individually the taxpayer would have been on stronger ground to urge that, as to Marie, the gift was complete in 1928. But it was as agent for the community, that Daniel held the right of revocation. For tax purposes the gift was incomplete until the right of revocation ceased on Daniel's death. "



IS CASE LAW REGARDING GIFT TAXES APPLICABLE TO ESTATE TAX CASES?

---

Appellant contends that the Chase Manhattan Bank case, supra, is persuasive authority for the decision of this Court, notwithstanding the characterization of it by the Appellee in the trial Court as inopposite.

Appellant contends that reliance on a case deciding a question of gift tax law is most appropriate for the estate and gift taxes are in pari materia.

Estate of Sanford v. Commissioner, 308 U.S. 39;

Merrill v. Fahs, 324 U.S. 888.

Beyond that, the Chase Manhattan Bank case of necessity determines the estate tax consequences on the death of the husband as a prerequisite to determining the gift tax consequences to the wife upon his death. As indicated above, "When Daniel (the husband) died, the Trust (the living trust) became irrevocable. His community one-half should have been included in his gross estate under Section 811(c) and 811(d) of the 1939 Code . . .". Moreover, at the inception of the opinion, the Court recognizes that the tax laws of the Federal Government apply to the results obtained under State law, when it says:

"This case turns on the community property law of Texas. Stated broadly, the question before us is the gift tax effects of trusts and insurance in a





community property state where the wife has a present vested ownership of half of the marital community in her own right."

## VII

### WHEN IS APPELLANT'S APPROVAL OF THE TRUST EFFECTIVE FOR TAX PURPOSES?

---

The trial Court in Conclusion of Law No. 2 (page 4, lines 7-9) finds the entire trust property taxable in the estate of the decedent LEROY J. KATZ, pursuant to Sections 2036 and 2038 of the Internal Revenue Code. In Conclusion of Law No. 5 (page 4, line 32 to page 5, line 25), the Court distinguishes the case of the United States v. Goodyear, 99 F.2d 523 (9th Cir. 1938) on the ground that the Goodyear case relies on Section 172 of the California Civil Code, whereas the ruling of the trial court is based ". . . on the powers as aforesaid expressly granted to the husband by the trust instrument and conferred upon him by plaintiff as a result of her consent and approval".

In the Goodyear case, this Court found that a trust agreement was effective to convert California pre-1927 community property into post-1927 community property; and that the powers retained by the husband under the trust were not such as to constitute the creation of a transfer intended to take effect at or after death, such that the entire trust res was includable in his estate.

The Goodyear case stands for the proposition that in



determining the amount of the gross estate of a deceased spouse for purposes of the federal estate tax, state community property law is applicable. The same conclusion is also reached in Lang v. Commissioner, 304 U.S. 264 (1938) and Rickenberg v. Commissioner of Internal Revenue, 177 F.2d 114 (9th Cir. 1949).

Assuming the validity of the trust here in question, appellant contends that the interest in the trust res retained by the trustor and the appellant, even though different from the community property transferred to the trust, was a community property interest and was equal in value to the property transferred. Under the rationale of the Stewart and Chase Manhattan cases, the community interest was held by the trustor and the appellant until the death of the trustor.

In the words of the Court in the Chase Manhattan case,

"It must be borne in mind that Daniel (the husband) did not create the trust. The community created it.

Any rights that were reserved in the settlor were rights held by the community . . . . Daniel's control . . . could be exercised only as agent for the community." (Emphasis supplied by the Court).

Appellant contends that if a valid trust was created by the decedent, it was as agent for the community and any revocation thereof would have been for the community. Thus no transfer was made by her until the trust became irrevocable upon the death of her husband.



The trial Court in Finding of Fact No. 12 (page 3, lines 27-29) states,

"Plaintiff has failed to assert any rights she may have had to withhold her consent or approval or to set aside the trust during decedent's lifetime, or after his death." "

If Appellant had the right as she urges she, in fact, did, to set aside the trust during decedent's lifetime or after his death, then a completed transfer was not made by her at the time of the execution of the trust or either of the amendments thereto or at any time during the lifetime of the trustor. Only after the death of her husband, when she failed to exercise her right to set aside the trust as to her community one-half did she make a transfer. The relinquishment of her right to set aside the trust was the act which made the transfer binding as to her and was the taxable event as to her.

Nor does the Kirkwood case require a different result since the Court in that case did not determine, nor was it required to determine, when the consent of the wife to the trust was binding upon her. The statute there in question was a California inheritance tax law applicable upon the death of her husband. Thus, if the husband had revoked the trust, or if the wife had sought to have it set aside during his lifetime or thereafter, the opposite result would have obtained.

Surely if the Appellant had been the first to die, her community interest in the trust res would have been the subject to tax





under Section 2036 of the Internal Revenue Code as a transfer with a retained life estate, and also under Section 2038 as a revocable transfer, in trust, by which the Appellant alone, or in conjunction with her deceased husband, retained the power to alter, amend, revoke, or terminate the trust.

In applying Sections 2036 and 2038 of the Internal Revenue Code to the entire trust corpus, as the trial Court did in its Conclusion of Law No. 2 (page 4, lines 7-9) a further problem is presented since under those sections an incomplete transfer by the decedent is made subject to a state tax. The transfer upon which the Court bases its decision was the creation of the trust, yet the Court held in its Finding of Fact No. 10 (page 3, lines 12-15) that prior to the execution of the trust, the property placed therein was the community property of the husband and wife. Thus, Appellant must have been the transferor of one-half of the trust res, and the decedent could therefore have been the transferor of no more than one-half of the trust res.

In order to maintain a logical consistency, the holding of the Court would seem to require a determination that the transfer to the trust was, in fact, two transfers, first a transfer by the Appellant to her deceased husband by way of gift of her interest in the community property; and then a transfer by the decedent of his half of the community property and the former community property of Appellant to the trust.

It would follow therefrom that Appellant made a taxable gift of her half of the community property to the decedent and is



therefore liable for gift tax on the same property which is subject to estate tax in her husband's estate. Further, as indicated above, upon Appellant's death, the same property will be subject to still another tax under Sections 2036 and 2038 as an incomplete transfer.

Such a grossly burdensome result should not be reached except upon the most compelling reasons. Here the contrary conclusion is the one consistent with the facts and the law, both as previously stated by this Court and the Fifth Circuit Court of Appeals.

## VIII

### WAS THE TRUST VALIDLY CREATED?

---

The Declaration of Trust approved on August 24, 1956, by LEROY JOSEPH KATZ, provided, inter alia, that the Trust was subject to partial or complete amendment and revocation by the Trustor (KATZ). It further provided that he would have the sole beneficial interest in the Trust during his lifetime. The Trust further provides that:

#### "SECTION FOUR

"During the lifetime and competency of the Trustor, the Trustee shall have no rights, duties, or powers with respect to any property held under this Trust, it being understood that the Trustor retains all such rights, and shall collect, receive, and disburse, without accounting to the Trustee or any other person,



all income of every nature and description from the real and personal property held hereunder.

"The Trustee shall not exercise any of the powers set forth in SECTIONS ONE, TWO and THREE hereof without first obtaining the written consent of the Trustor, during his lifetime, and after his death, without first obtaining the written consent of all of the adult beneficiaries who are then entitled to receive the income hereunder. "

In addition to that, the Trust provides that:

"SECTION FIVE

"Upon the death of the Trustor, the Trustee shall then commence to manage the trust property and shall distribute in monthly installments all net income to SADIE KATZ, the Trustor's wife. "

California law clearly recognizes that a Trust will not be found invalid because the Trustor reserves the right to amend or revoke the Trust during his lifetime, and similarly when in addition to that the Trustor also retains a beneficial life interest in the Trust, it will likewise not be found invalid.

Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 (1895).

The Trust instrument involved in the instant case not only includes the Trustor's reservation of the right to amend or revoke





(SECTION THIRTEEN of the Trust), and the right to retain a beneficial life interest in the Trustor, but also involves a total retention of all of the rights to control the administration of the Trust during the Trustor's lifetime, without any duty to account to the purported Trustee or to any other person, as set forth in SECTION FOUR of the Trust.

California Civil Code, Section 2221 permits the creation of a Trust in real or personal property, by any words or acts of the Trustor indicating with reasonable certainty:

1. An intention on the part of the Trustor to create a Trust; and
2. The subject, purpose and beneficiary of the Trust.

The Declaration of Trust clearly reflects the fact that real or personal property had already been transferred to the named purported Trustee, Title Insurance and Trust Company. However, the mere transfer of property to one designated as Trustee does not create a valid Trust in and of itself, and it is essential that there be a clear manifestation of intent of the Trustor to create a Trust.

California Civil Code, Section 2221;  
Gonzalez v. Riis, 171 Cal. App.2d 473,  
340 P.2d 1015 (1959).

The question herein involved is whether MR. KATZ genuinely intended to divest himself of the ownership of his property and place it in the hands of a Trustee, subject to the terms of the



administration of the Trust. The answer to this basic question can clearly be ascertained from the terms of the Trust instrument. The Trustee's only right, power or duty during the lifetime of the Trustor, was that of a mere custodian of legal title. LEROY KATZ not only retained the right to control the Trust administration but in fact, he retained the right to administer the Trust himself. Therefore, at the time of the purported creation of the Trust, LEROY KATZ was the Trustor, sole beneficiary, and exclusive administrator. The only transfer of interest in the subject property was a mere divestment of the bare legal title.

The foregoing analysis of the terms of this Trust, makes it abundantly clear that MR. KATZ never intended to give up any of the indicia of the ownership of property, save and except for the bare legal title, and even that was at his beck and call any time that he desired to deal with the property, in whole or in part. By virtue of the foregoing terms of the Trust, as set forth in SECTION FOUR and SECTION FIVE, the named Trustee was powerless to restrain or alter any of the conduct in which MR. KATZ may have wished to engage during his lifetime with respect to the property.

A Trust in which the Trustee is a mere depository and has no duties is designated a simple or dry trust (54 Am. Jur. 30, 31, Trusts Section 13 and 48 Cal. Jur. 2d 657, Trusts Section 6). Under such a Trust a beneficiary is entitled to actual possession and enjoyment of the property, and to dispose of it, or to call upon the Trustee to execute such conveyances of the legal estate as he



directs, and the beneficiary has an absolute control over the beneficial interest together with a right to call for the legal title. Ringrose v. Gledall, 17 Cal. App. 664, 121 Pac. 407. It is elementary that the interest of the settlor, the Trustee, and the beneficiary cannot be held by the same individual and result in validly created Trust, as stated in 54 Am. Jur. 47 Trusts Section 35,

"Where the settlor is the Trustee, the equitable interest must be in another."

Courts will often attempt to resolve ambiguities in the Trust instrument to protect the interests of the beneficiaries not the settlors of Trusts. However, the purported Trust herein involved is a mere sham, because during the lifetime of LEROY KATZ he is the settlor, he is the sole beneficiary and he acts with absolute control and authority in dealing with the property.

Furthermore, the Trust is ambiguous as to the designation of the Trustee. On the one hand the Trust instrument states that Title Insurance and Trust Company has received certain property constituting the Trust res, that as Trustee it has certain powers to manage and control the Trust property (SECTIONS ONE, TWO and THREE of the Trust). On the other hand however, the Trust instrument clearly states that during the lifetime of LEROY KATZ the Trust powers are retained for his exclusive control and that the named Trustee, Title Insurance and Trust Company, shall have no powers, and can perform no acts without his (KATZ'S) written consent. Therefore, nothing more than a simple or dry





trust was created with an attempt to direct the testamentary disposition of the Trust property upon LEROY KATZ'S death.

It is clear that during the lifetime of LEROY KATZ he reserved in totality the right to control the Trust property without accounting to any other person. It is asserted that where the Trustor reserves the right to amend or revoke the Trust and retains a beneficial life interest in it, and also reserves such power to control the Trustee in the administration of the Trust, no effective Trust is created. The purported Trustee is merely the Trustor's agent acting under his direction, and any disposition of the purported Trust property that the Trustor attempts to make at that juncture, is a testamentary disposition. Which, in order to be valid, would require compliance with the Statute of Wills.

The leading case in the United States dealing with the issue of a settlor reserving control over the Trustee in the administration of the Trust is Newman v. Dore, 275 N. Y. 371, 9 N. E. 2d 966. This case involves the rights of a widow in her attack on validity of an attempted transfer by her husband of all his real and personal property. The terms of the Trust involved in that case are stated on page 968 of the opinion.

" . . . he reserved the enjoyment of the entire income as long as he should live, and a right to revoke the trust at his will, and in general the powers granted to the trustees were in terms made 'subject to the settlor's control during his life', and could be exercised 'in such manner only as the settlor



shall from time to time direct in writing'."

The Court, in its analysis considered the issue of whether or not the transfer was prohibited by the law of the state of New York, and they found it was not. Next, they asked if it was an attempt to evade the law so as to diminish the contingent expectant estate of the wife. The Court concluded that an attempted circumvention of the law would not cause the transfer to be invalid, and that the husband's motive or intent regarding the diminution in the wife's expectancy was an unsatisfactory test of the validity of the transfer of property. The Court adopted a test which asked the question of whether the settlor, divested himself of the ownership of the property, stating at page 969,

"The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. The 'good faith' required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property."

The Trust herein involves not merely the right to control the Trustee and the administration of the Trust, but afortiori it contains a total retention by MR. KATZ of the power to deal with



the Trust property in the same manner that he had dealt with it prior to the transfer and Declaration of the Trust. The only change effectuated by this transaction was a change merely in form and not in substance. The named Trustee did obtain legal title, however that interest in legal title was totally subject to MR. KATZ's wishes because as the Trust instrument indicates in SECTIONS FOUR and FIVE, all of the powers to deal with the Trust property were reserved to MR. KATZ during his lifetime, and none were vested in the named Trustee.

The California courts have not clearly dealt with the question of the validity of a trust where there is a reservation of the power to amend or revoke, a retained beneficial life interest and retained powers to control the Trustee in the administration of the trust. The closest expressions on this issue are found in De Martini v. Allegretti, 146 Cal. 214, 79 Pac. 871 (1905) and Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (1908). In the De Martini case the decedent deposited certain funds with the third persons directing them to invest the funds in their names. He thereafter wrote them a letter setting forth certain dispositive provisions with respect to the funds to take effect upon his death. The reservation of control involved in this case as disclosed by the evidence included the following:

1. No limit was placed on the amount up to the whole thereof that the settlor could draw;
2. That the third persons were investing and keeping the money in their names for the use and benefit





of the Trustor; and

3. That the Trustor made the written instrument directing the disposition of the funds after his death for the primary reason "to get rid of the necessities of probate proceedings."

The Court held that in view of the circumstances established by the evidence, the transfer to third persons did not create in them any present vested interest or estate in the property, therefore, a valid trust was not created. The Court further found that the direction to dispose of the property upon the settlor's death was invalid because the writing did not comply with the Statute of Wills, therefore, the property remained in the decedent's estate and was subject to the laws of interstate succession.

The Trust instrument involved here is certainly more formal in nature. It sets forth dispositive provisions with substantially greater complexity, and was executed at a time when matters of this type are more complex and sophisticated. The basic elements, however, are here as they were in the De Martini case.

1. There was no limitation on MR. KATZ's power to deal with the Trust property as stated in SECTION FOUR of the Trust, ". . . the Trustor . . . shall collect, receive and disburse without accounting to the Trustee or any other person . . . ."
2. There was a transfer to third persons to hold property for the use and benefit of the Trustor.



However, in MR. KATZ's case, the Trustee did not even have the power to make investments for the benefit of the Trustor; and

3. The Trustor here made a written instrument, instructing the disposition of the funds to named beneficiaries after his death.

Property which fails to be validly transferred by a Trustor in an inter vivos Trust remains in the estate of the transferror.

De Martini v. Allegretti, supra. Upon death a valid testamentary disposition must comply with the Statute of Wills, as stated in California Probate Code, Section 50. The Trust instrument does not comply with the Statute, as required, in that it is not subscribed by the testator at the end thereof in the presence of at least two witnesses who must sign as witnesses in the presence of the testator and at his request. The property subject to testamentary disposition would therefore vest in the surviving spouse, pursuant to California Probate Code, Section 201.

"Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

It is therefore asserted that in view of the foregoing analysis of the Trust, the Trust was a mere attempt to obtain a testamentary



disposition of the property that did not comply with the Statute of Wills, and one in which the Trustor did not sufficiently divest himself of the ownership and control of the property so as to create a valid inter vivos Trust.

## IX

### IS THE DECISION FOR THE GOVERNMENT REQUIRED TO PREVENT TAX AVOIDANCE?

---

Appellant wishes to emphasize that this is not a case of tax avoidance. Under the first theory advanced by Appellant, that a valid trust was created which did not result in the transmutation of Appellant's community property, Appellant is liable for a gift tax upon the death of her husband on her community half of the trust res less her retained life estate in that half. She will also be liable for an estate tax upon her half of the trust res transferred subject to her retained life estate; less, of course, a credit for the gift tax paid.

Under Appellant's alternate theory, that the trust is invalid, all of the trust res passes to Appellant and is subject to tax in her estate. Probate Code, Section 201.5 (Footnote No. 5), less, of course, a credit for estate tax previously paid to which Appellant's estate will be entitled.





## CONCLUSION

Appellant contends that the judgment rendered by the District Court dismissing Appellant's complaint should be reversed.

Appellant further contends that Appellant's Motion for Summary Judgment should properly have been granted by the District Court.

The res of the trust has been considered for the purposes of argument to be community property. All parties to this litigation concede that it was necessary for the Appellant to have intended to transmute her interests in the community property to her husband's separate property. In the absence of any such intent, the Appellant's share of the community property could not be includable in her husband's estate.

If there was any intent to transmute, such intent must be found either tacitly or expressly in the approval by Appellant of the Declaration of Trust.

California community property law, Sections 172 and 172a of the Civil Code clearly establish that the husband has the management and control of the community. As a correlative of his rights of management and control, he has the responsibility of supporting his spouse. The necessary effect of the Civil Code sections is such that Appellant had no right to superimpose her management and control of the community funds. Since these rights were statutory, Appellant urges that her conclusion be sustained that Appellant's alleged intent to transmute is not found in her



acquiescence to those rights established for her benefit under applicable California law.

The trust instrument is clear in that there is no express intent manifesting a clear indication that Appellant was willing to, or did, transmute her share of the community to her husband's separate property. The approval which Appellant signed can reasonably be interpreted as an approval only as to the form of the Declaration of Trust. Even assuming that it was an approval as to substance, such approval would be consistent with the previously discussed duties that she has to respond to the management of her husband. But what is of even greater significance in this case is the fact that Appellant is alleged to have converted her share of the community property to her husband's separate property without the benefit of independent counsel.

The settled California case law is consistent with the position of Appellant and inconsistent with the decision of the trial Court on this point.

The issues in this case have been previously adjudicated by this Circuit Court of Appeals in the case of United States v. Stewart and United States v. Goodyear and in the Court of Appeals for the Fifth Circuit in the case of Commissioner v. Chase Manhattan Bank.

Stated succinctly, those cases establish that the interests of a wife in a community property state must be determined under local law; the tax law is applied to the results as determined under local law.



acquiescence to those rights established for her benefit under applicable California law.

The trust instrument is clear in that there is no express intent manifesting a clear indication that Appellant was willing to, or did, transmute her share of the community to her husband's separate property. The approval which Appellant signed can reasonably be interpreted as an approval only as to the form of the Declaration of Trust. Even assuming that it was an approval as to substance, such approval would be consistent with the previously discussed duties that she has to respond to the management of her husband. But what is of even greater significance in this case is the fact that Appellant is alleged to have converted her share of the community property to her husband's separate property without the benefit of independent counsel.

The settled California case law is consistent with the position of Appellant and inconsistent with the decision of the trial Court on this point.

The issues in this case have been previously adjudicated by this Circuit Court of Appeals in the case of United States v. Stewart and United States v. Goodyear and in the Court of Appeals for the Fifth Circuit in the case of Commissioner v. Chase Manhattan Bank.

Stated succinctly, those cases establish that the interests of a wife in a community property state must be determined under local law; the tax law is applied to the results as determined under local law.





The Stewart and Chase Manhattan Bank cases establish that the wife retains substantial interests in community property transferred either into insurance or annuity contracts, or into an inter vivos trust; and that those rights persist until the death of the husband or the wife, transmutes them. Thus, it is the death of the first spouse which is the taxable event.

Assuming, arguendo, the validity of the trust established, it follows that Appellant's rights to the community property remained unchanged until the death of her husband so that only one-half of the trust res is properly includable in the taxable estate of her husband; the other one-half of the trust res being taxable to Appellant under the gift tax law to the extent by which that one-half exceeds her retained life estate therein.

It is settled law that the gift and estate taxes are in pari materia; and that the application of decisions in gift tax cases is appropriate in this appeal.

It is contended that the attempted transfer of the community property to Title Insurance and Trust Company did not form the basis for the creation of a valid trust by LEROY J. KATZ. The fatal defect arose out of the reservation by MR. KATZ of the total right to deal with the property to the exclusion of the vesting of any of the rights of control in the designated trustee during MR. KATZ's lifetime. The establishment of a trustee with bare legal title and without any right or power with respect to the property created a dry trust which vested no interest in the trustee as set forth in the California case of Ringrose v. Gledall, supra.



In addition, the attempted transfer with the reservation of the aforesaid control over the subject property was illusory. When an owner of property transfers legal title to a purported trustee with a complete reservation of control over the administration of the trust, there is no real intent to divest one's self of the ownership. This principle is supported by the decisions of Newman v. Dore, supra and De Martini v. Allegretti, supra.

In the instant case, MR. KATZ retained every indicia of ownership except for the mere divestment of the bare legal title to the property and in substance during his lifetime he was the settlor, the trustee and the sole beneficiary.

The trust instrument not only failed to establish a valid trust but was also invalid as a testamentary disposition of the property.

The Statute of Wills is embodied in California Probate Code, Section 50. It is demonstrated on the face of the instrument that there is clearly a lack of compliance with this code section resulting in an invalid attempt to make a testamentary disposition.

The tax result under this theory is that one-half of the trust res only, is taxable in the estate of MR. KATZ and that upon the death of Appellant the entire trust res will be taxable in her estate less, of course, a credit for estate taxes paid in MR. KATZ's estate upon his one-half of the trust res.

Respectfully submitted,  
NORTON A. KESTEN and  
LEVINSON, MARCUS & BRATTER  
By: BURTON S. LEVINSON  
Attorneys for Appellant.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/     Burton S. Levinson  
BURTON S. LEVINSON









## APPENDIX "A"

### Footnote No. 1

#### Civil Code, Section 172

Except as provided in Section 172b, the husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

### Footnote No. 2

#### Civil Code, Section 172a

Except as provided in Section 172b, the husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided,



also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

Footnote No. 3

Civil Code, Section 161a

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.





Civil Code, Section 164

All other real property situated in this state and all other personal property whatever situated acquired during the marriage by a married person while domiciled in this state is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife and that when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status



after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

Footnote No. 5

Probate Code, Section 201.5

Upon the death of any married person domiciled in this State one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse; all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:

(a) By the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this State at the time of its acquisition; or



(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere.

All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 of this code.

As used in this section personal property does not include and real property does include leasehold interests in real property.





In the United States Court of Appeals  
for the Ninth Circuit

---

SADIE KATZ, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

On Appeal from the Judgment of the United States  
District Court for the Central District of California

---

BRIEF FOR THE APPELLEE

---

FILED

MITCHELL ROGOVIN,  
*Assistant Attorney General.*

JAN 6 1937

LEE A. JACKSON,  
LORING W. POST,  
ROBERT M. WILLAN,

*Attorneys,  
Department of Justice,  
Washington, D.C. 20530.*

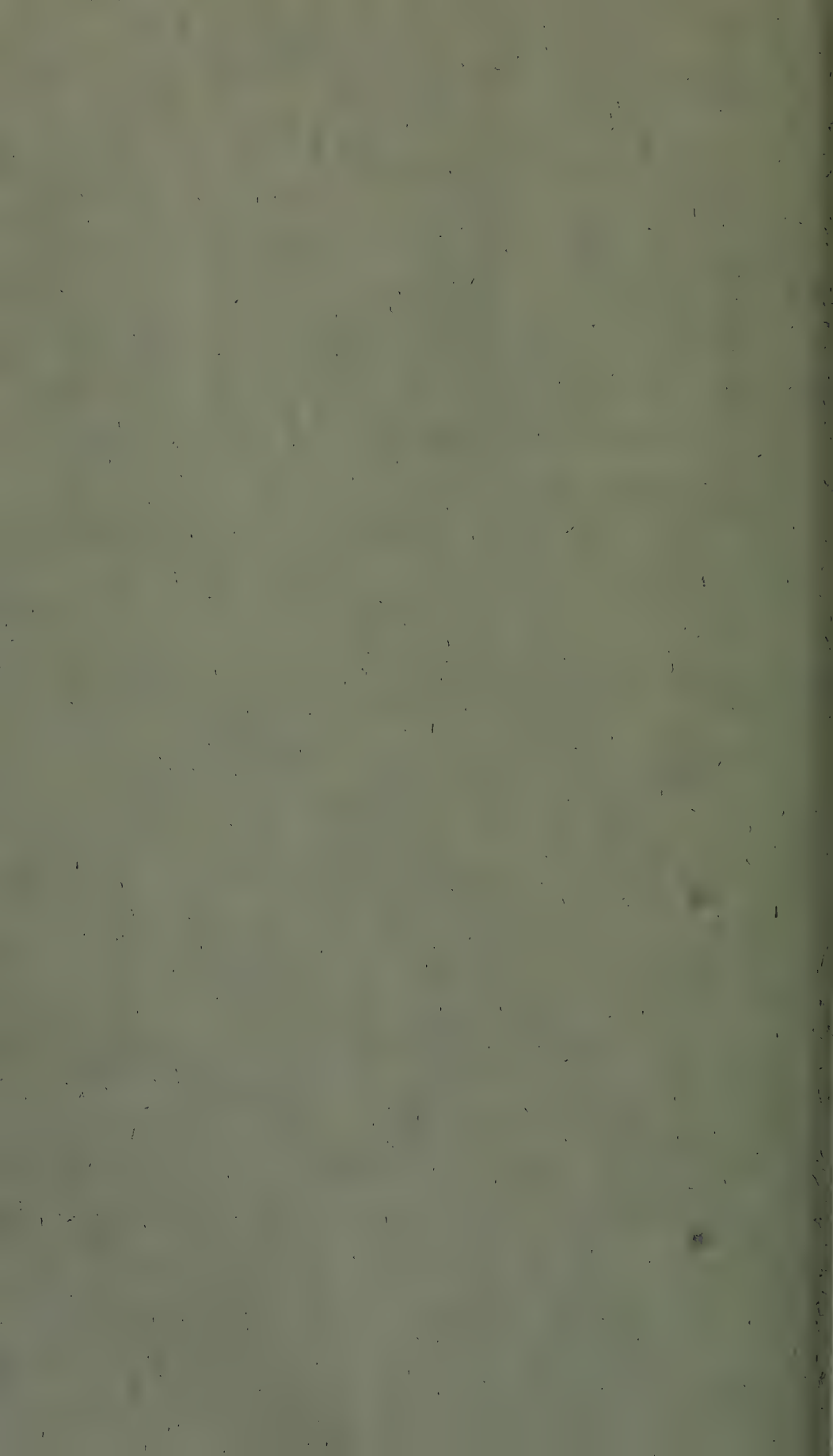
WM. E. LUCK, CLERK

*Of Counsel:*

JOHN K. VAN DE KAMP,  
*United States Attorney.*

LOYAL E. KEIR,  
DONALD M. FENMORE,  
*Assistants United States Attorney.*

---



# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statutes and Regulations involved .....	3
Statement .....	3
Summary of argument .....	5
Argument:	
I. The District Court correctly held that in the absence of any underlying oral or collateral agreements changing the effect of the express, written terms of the Declaration of Trust, the necessary legal effect of taxpayer's approval of the trust instrument was to part with her interest in the community property transferred to the trust .....	7
A. Introduction .....	7
B. Taxpayer consented to the Declaration of Trust with advice of counsel and without any oral or collateral agreements at variance with the terms of the trust .....	11
C. Taxpayer, by her written consent to the transfer in trust of the property involved, waived any community property rights she may have had in the property prior to the formation of, and conveyance to, the trust..	14
1. <i>Kirkwood v. Bank of America</i> supports the District Court's holding .....	14
2. The evidence as a whole supports the District Court's finding that taxpayer, by her written consent to the creation of the trust, parted with her interest in the community property transferred to the trust .....	18

Argument—Continued	Page
D. The three principal cases relied on by taxpayer and Amicus Curiae do not support the contention that she retained a community interest in the trust under the facts obtaining in this case .....	22
1. <i>Commissioner v. Chase Manhattan Bank</i> .....	22
2. <i>United States v. Stewart</i> .....	25
3. <i>Estate of McGowan v. Commissioner</i> ....	27
E. The trust involved was validly created .....	29
II. In the alternative, the portion of the trust property attributable to taxpayer's interest in community property transferred to the trust is includible in the gross estate of decedent, Leroy J. Katz, under Section 2041 of the Internal Revenue Code .....	33
Conclusion .....	35
Appendix .....	36

## CITATIONS

## Cases:

<i>Atwell, Estate of</i> , 85 Cal. App. 2d 454, 193 P. 2d 519 .....	18
<i>Bank of America Nat. Trust &amp; Savings Ass'n v. Rogan</i> , 33 F. Supp. 183 .....	8
<i>Bank of California v. Commissioner</i> , 133 F. 2d 433 .....	29
<i>Britton v. Hammell</i> , 4 Cal. 2d 690 .....	20
<i>Commissioner v. Chase Manhattan Bank</i> , 259 F. 2d 231, certiorari denied, 359 U.S. 913 ...	22, 23, 24, 27
<i>Ettlinger v. Connecticut Gen. Life Ins. Co.</i> , 175 F. 2d 870 .....	23
<i>General Utilities Co. v. Helvering</i> , 296 U.S. 200 ..	29
<i>Hansen v. Bear Film Co.</i> , 28 Cal. 2d 154, 168 P. 2d 946 .....	31-32
<i>Helm, Estate of</i> , 6 Cal. App. 752, 45 P. 2d 250 ....	19

### III

Cases—Continued	Page
<i>Helvering v. City Bank Farmers Trust Co.</i> , 296 U.S. 85 .....	28
<i>Katz v. United States</i> , 255 F. Supp. 642 .....	1
<i>Kirkwood v. Bank of America</i> , 43 Cal. 2d 333, 273 P. 2d 532 .....	14, 17, 18, 24, 27
<i>Machado v. Machado</i> , 122 Cal. App. 218, 9 P. 2d 872 .....	19
<i>McGowan, Estate of v. Commissioner</i> , 43 B.T.A. 695, appeal dismissed, 123 F. 2d 64 .....	27
<i>Metzger v. Vestal</i> , 2 Cal. 2d 517, 42 P. 2d 67 .....	10, 11
<i>Monell v. College of Physicians &amp; Surgeons</i> , 198 Cal. App. 2d 38, 17 Cal. Rptr. 744 .....	32
<i>Nichols v. Emery</i> , 109 Cal. 323, 41 Pac. 1089 .....	29
<i>Phinney v. Kay</i> , 275 F. 2d 776 .....	34
<i>Reiss v. Reiss</i> , 45 Cal. App. 2d 740, 114 P. 2d 718..	31
<i>Spreckels v. Spreckels</i> , 172 Cal. 775, 158 Pac. 537 .....	10
<i>Schindler v. Schindler</i> , 126 Cal. App. 2d 597, 272 P. 2d 566 .....	19-20
<i>United States v. Stewart</i> , 270 F. 2d 894 .....	24, 25, 26, 27
Statutes:	
Civil Code, 6 West's Annotated California Code:	
Sec. 172 .....	36
Sec. 172a .....	36
Internal Revenue Code of 1954:	
Sec. 2036 (26 U.S.C. 1964 ed., Sec. 2036) ....	37
Sec. 2038 (26 U.S.C. 1964 ed., Sec. 2038) ....	38
Sec. 2041 (26 U.S.C. 1964 ed., Sec. 2041) .....	39
Miscellaneous:	
164 A.L.R. Annotations, 881, 889 .....	32
Bogert, Trusts & Trustees (2d ed.), Sec. 104 .....	32
10 Cal. Jur. 2d, Community Property, Sec. 59 .....	19
1 Restatement of Trusts (2d), Sec. 57 .....	32
1 Scott, Trusts (2d ed.), Sec. 57.1 .....	32
Treasury Regulations on Estate Tax, Sec. 2041-1 (26 C.F.R., Sec. 2041-1) .....	39





**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 21,119

SADIE KATZ, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**On Appeal from the Judgment of the United States  
District Court for the Central District of California**

---

**BRIEF FOR THE APPELLEE**

---

**OPINION BELOW**

The District Court rendered no opinion. Its findings of fact and conclusions of law (R. 236-240) are reported at 255 F. Supp. 642.

**JURISDICTION**

This appeal involves federal estate taxes. The date of death was February 27, 1960. The taxes in dispute were paid as follows: \$54,405.44 as deficiency tax, plus interest of \$3,572.13, or a total of \$57,977.57 on September 14, 1962. (R. 9.) Claim for refund of

\$57,977.57 was filed on July 1, 1963 and was rejected on February 12, 1964. (R. 7, 9.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, and on January 16, 1964, the taxpayer brought this action in the District Court for the recovery of \$57,977.57, plus interest. (R. 2-4.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on February 11, 1966. (R. 241.) Within sixty days thereafter, on April 8, 1966, a notice of appeal was filed by the taxpayer (R. 243.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

### QUESTIONS PRESENTED

1. Whether the full value of property, assumed to be community property for purposes of the motion for summary judgment, which was transferred to a trust by the decedent, Leroy J. Katz, with the written consent of his wife, became the separate property of the decedent and thus includible in full in his gross estate under Section 2036 and 2038 of the Internal Revenue Code of 1954 by virtue of the rights retained by him, or whether the property in the trust was a community asset until the death of the decedent so that only one-half of the value of the trust property is includible in his gross estate.

2. In the alternative, whether the portion of the trust property attributable to the wife's one-half interest in the community, is includible in the decedent's estate under Section 2041 of the Code (relating to powers of appointment).

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations may be found in the Appendix, *infra*.

## STATEMENT

The essential facts as found by the District Court (R. 236-240), supplemented by the record, may be summarized as follows:

The taxpayer, Sadie Katz, was the wife of Leroy J. Katz, the decedent herein, who died on February 27, 1960. On that date both taxpayer and decedent were residents of California. On August 24, 1956, decedent created a trust (referred to herein sometimes as the Katz trust) naming himself as the trustor, and the Title Insurance and Trust Company, Los Angeles, California, as trustee. The Government concedes, solely for purposes of its motion for summary judgment, that prior to the execution of the instrument creating the Katz trust, the property placed in the trust was the community property of taxpayer and decedent. (R. 237, 238.)

Section four of the trust instrument provided that the Trustor, Leroy J. Katz, retained rights to the property transferred to the trust, including the right to "collect, receive, and disburse, without accounting to the Trustee *or any other person*, all income" from the property. (Emphasis supplied.) (R. 64.) Under Section thirteen of the trust instrument the Trustor, Leroy J. Katz, reserved the right "to revoke, terminate or amend" the trust at any time. (R. 69, 237.)

Under the terms of the trust as they existed at the time of decedent's death, the taxpayer upon the death of her husband was entitled to 80 percent of the trust income for life and the two children of the spouses were entitled to 20 percent; and after the taxpayer's death the trust was to continue for the benefit of the children and their issue. (R. 65-68, 79-86.)

Taxpayer, having been advised by counsel, executed the original Declaration of Trust by signing a portion thereof headed "Approval of Wife" in which she expressed full approval of the Declaration of Trust. (R. 72, 192, 237.) In addition, Leroy J. Katz exercised his right to amend the trust on two different occasions, i.e., April 27, 1957 and October 21, 1958, and on each occasion taxpayer signed a consent to such partial amendments under the heading "Consent of Trustor's Wife to Partial Amendment," which provided that taxpayer "[does] hereby consent to and fully approve the foregoing Partial Amendment." On each of these occasions taxpayer was advised by counsel. (R. 83, 86, 237-238.)

No oral or collateral agreements between Leroy J. Katz and taxpayer existed concerning the trust or the property which was the res of the trust, or which were at variance with the terms of the trust. The trust instrument expresses the full intent of the parties to the trust. (Dep. 14, 29-30; R. 238.)

The District Court found and held that by virtue of execution of the trust instrument, under the circumstances described, the property transferred to the trust became the separate property of the decedent, Leroy J. Katz, "since, under the terms of the trust,



he was accorded the right solely to enjoy the income from the trust and was given the power to revoke, terminate or amend the trust. These rights and powers vested in the said decedent control of, and the beneficial enjoyment of, all of the trust property.” (R. 238.)

### SUMMARY OF ARGUMENT

The District Court correctly held that in the absence of any underlying oral or collateral agreements changing the effect of the express, written terms of the Declaration of Trust involved herein, the necessary legal effect of taxpayer’s approval of the trust instrument was to part with her community interest in the property transferred to the trust and to make it all the separate property of her husband, the decedent herein. The evidence as a whole supports the District Court’s finding that taxpayer, with the advice of the family attorney, whom she subsequently employed after her husband’s death, gave her full approval to the terms of the trust agreement.

A husband’s investment of community funds in life insurance or annuity policies is, contrary to taxpayer’s assumption, not necessarily or always the same as the arrangements represented by creation of an inter vivos trust with community funds. And moreover, while a husband may be regarded as acting as manager of the community in some cases when he creates a revocable inter vivos trust and funds it with community property, nevertheless, the wife may give her consent or approval to the creation of new



or different rights. The husband and wife by joint action may make any disposition of their community property that they choose to make. Thus, the wife in the instant case parted voluntarily with her interests in the community property as they existed before the transfer in trust and succeeded to a new and different interest in the property which was governed by the terms of the trust.

In the proceedings below, it was assumed by all concerned that the instant trust was valid, and taxpayer's belated contention to the contrary is out of order and not permissible for purposes of this appeal. In any event, the point is without merit, and the trust was valid under California law even though decedent retained the income for life and also a power of revocation.

Since the decedent had the right to the trust income and the power to revoke the trust during his lifetime, the entire trust property is clearly includible in his gross estate for purposes of the federal estate tax under Sections 2036 and 2038 of the 1954 Code if as held by the District Court the entire property transferred to the trust became his separate property by agreement of the spouses.

And even if the wife continued to be the owner of a community one-half of the property placed in the trust, still, she gave to the decedent such broad powers over her share as to constitute a general power of appointment. He could exercise such powers for his own benefit and hence, her share would be includible in his gross estate under Section 2041 of

the Code. In view of its disposition of the case, the District Court did not need to reach this alternative contention.

## ARGUMENT

### I

**The District Court Correctly Held That in the Absence of Any Underlying Oral or Collateral Agreements Changing the Effect of the Express, Written Terms of the Declaration of Trust, the Necessary Legal Effect of Taxpayer's Approval of the Trust Instrument Was to Part With Her Interest in the Community Property Transferred to the Trust**

#### A. *Introduction*

The estate tax here disputed was imposed on the estate of the decedent, and is attributable to the inclusion in his gross estate of the entire corpus of a trust established by him on August 24, 1956.<sup>1</sup> Taxpayer contends that only one-half should be included because the trust was established with community property in which each spouse had a one-half interest. If the taxpayer's one-half interest in the community property transferred in trust was transmuted into the separate property of the decedent, then the entire trust property is includible in the gross estate of the decedent under Sections 2036 and 2038 of the

---

<sup>1</sup> This appeal is from a summary judgment for the Government and against the taxpayer. Solely for purposes of the motion for Summary Judgment, the Government agreed that the property transferred to the subject trust was community property prior to its transfer. In the event that this appeal is decided in favor of the taxpayer, the case should be remanded for such further proceedings as may be appropriate.

Internal Revenue Code of 1954 (Appendix, *infra*) by virtue of the fact that under the trust instrument the decedent reserved the right to the income for his life and retained the power to revoke or terminate the trust and withdraw the corpus. The District Court so held.

California Bankers Association has filed a brief as Amicus Curiae because of the interest of its member banks in administering revocable inter vivos trusts and because of the alleged effect on such trusts of the construction given by the District Court to the trust involved in this case. The statement is made by Amicus Curiae (Br. 2) that where a trust is established with community property, the settlors "normally" have no intention of changing the nature of their property from community to something else during the period the trust is revocable. This is limited, parenthetically, to situations where the husband is acting as manager of the community or the husband and wife act together. We recognize that an inter vivos trust created jointly by husband and wife with community property and revocable by their joint action does not change the nature of community property. *Bank of America Nat. Trust & Savings Ass'n v. Rogan*, 33 F. Supp. 183 (S.D. Cal.). And, of course, if the husband is in fact acting as manager of the community in establishing an inter vivos trust, there is no intent to change the character of the community property transferred in trust. However, to suggest that the District Court's holding frustrates the "normal desires and expentancies" of parties to inter vivos trusts under the facts of the instant case, as does

Amicus Curiae (Br. 3), is without foundation and it is inappropriate for Amicus Curiae to make such a statement on the basis of the present record.

The facts material to the issue of transmutation of community property to separate property are as follows:

On August 24, 1956, the decedent created a trust naming himself as the trustor and Title Insurance and Trust Company, Los Angeles, California, as the trustee. As indicated above, for purposes of the motion for summary judgment the Government conceded that prior to its transfer in trust the property involved was the community property of decedent and his wife, the taxpayer herein. Under Section Four of the Declaration of Trust Mr. Katz was vested with the sole power to collect and disburse all trust income "without accounting to the Trustee or any other person." Section Four also provided (R. 64):

The Trustee shall not exercise any of the powers set forth in SECTIONS ONE, TWO AND THREE hereof without first obtaining the written consent of the Trustor, during his lifetime, and after his death without first obtaining the written consent of all of the adult beneficiaries who are then entitled to receive the income hereunder.

Sections One, Two, and Three contain provisions setting forth the trustee's powers relating to the management of the real and personal property.

Under Section Thirteen Mr. Katz reserved the right "to revoke, terminate or amend" the trust at any time. (R. 69.) After the death of Mr. Katz, the



taxpayer was given a life estate in 80 percent of the trust income, and at her death the remainder of the trust estate was to be held for the benefit of the children of the spouses and their issue. (R. 79-86.)

The taxpayer executed the original Declaration of Trust by signing a portion thereof headed "Approval of Wife" in which she expressed full approval of the Declaration of Trust. (R. 72.) Sections Five, Fourteen, and Fifteen of the trust were amended by Mr. Katz on April 27, 1957. Section Six of the trust was amended by Mr. Katz on October 27, 1958. In both instances the taxpayer signed a consent to such partial amendments under the heading "Consent of Trustor's Wife to Partial Amendment", which provided that taxpayer does "hereby consent to and fully approve the foregoing Partial Amendment." (R. 79-83, 84-86.)

It is well established that for a transfer of community personal property by the husband to be voidable at the suit of the wife it must be shown to have been made not only without consideration, but also without the written consent of the wife. *Metzger v. Vestal*, 2 Cal. 2d 517, 522, 42 P. 2d 67, 69; *Spreckels v. Spreckels*, 172 Cal. 775, 784, 158 Pac. 537, 540. In the *Metzger* case there was a transfer to the son of stock in a newly formed corporation, assets of which had constituted community property. It was held that such transfer was not voidable by the wife's assignees although unsupported by consideration, since the wife had consented in writing to the gift to the son. Taxpayer seeks to distinguish *Metzger* on

the ground that there was an underlying oral agreement in *Metzger*, whereas there is no such oral agreement in the instant case. A careful reading of *Metzger* indicates that the oral agreement is significant there only because the wife's action in signing the instruments of transfer and the articles of incorporation was ambiguous without the explanation afforded by the oral agreement. In the instant case, Sadie Katz' written approval of the creation of the trust is unambiguous, and as shown below she has testified that the parties did not have any oral or collateral agreements at variance with the terms of trust.

***B. Taxpayer consented to the Declaration of Trust with advice of counsel and without any oral or collateral agreements at variance with the terms of the trust***

The facts concerning the taxpayer's consent to and approval of the Declaration of Trust and amendments thereto are relevant. The District Court found (R. 237-238) that taxpayer had been advised by counsel at the time that she gave her consent to the trust and amendments. The taxpayer's deposition, taken November 17, 1965, reveals the following (Dep. 12):

Q. BY MR. FENMORE. When Mr. Katz was alive who was your attorney?

A. Mr. Fischgrund, Sidney Fischgrund.

Q. How long had he been your attorney?

A. As long as we were in Los Angeles.

Q. Since 1940?

A. Since 1940.

Q. Who hired him?

A. My husband.



Q. Did you continue to hire him after Mr. Katz passed away?

A. Yes, we had great faith in him.

Q. Did you meet with Mr. Fischgrund often?

A. Whenever it was necessary.

Q. Mrs. Katz, did you attend business meetings with your husband?

A. Yes. He never went anywhere without me.

Q. Did he keep you apprised of all of his business activities?

A. Oh, yes. We were always together.

The Declaration of Trust and the partial amendments were each signed by Sidney Fischgrund as attorney for the trustor, indicating that he participated in the establishment of the trust. Continuing with the deposition of taxpayer (Dep. 14-15):

Q. Did you fully agree with the form of this trust?

A. Surely.

Q. Did you ever attend any meetings when the trust was created?

A. Surely, yes.

Q. Where did these meetings take place, do you remember that?

A. Well, Title Insurance and Trust.

Q. Do you remember who was present at the meetings?

A. Oh, I wouldn't know.

Q. Do you remember basically what was discussed at these meetings?

A. You discuss the format, I guess.

Q. At that time did you tell the trust officer that you agreed with the trust or did you tell him that you objected in any way to the trust?

A. No, we did it together according to their advice.

Q. Did you ever intend to interfere with the trust?

A. Oh, no.

Later on during the deposition of the taxpayer the following as to absence of collateral agreements was brought out (Dep. 29-30):

Q. According to your best knowledge, the trust that you created with your husband, was there any conditions that were imposed upon the trust that didn't appear on the document itself; that is, is the trust instrument a clear reflection of the intent that you and Mr. Katz intended?

MR. KESTEN: I will object to the form of the question.

MR. FENMORE: I will rephrase the question.

Q. You remember signing the trust instrument?

A. Yes.

Q. In that trust instrument is there contained everything which you intended and which Mr. Katz intended to be in the trust?

A. Yes, yes.

Q. Did you have any other understandings beyond what was contained in that trust agreement concerning the property?

A. No.

Taking into account the taxpayer's testimony as to (1) her relationship to the attorney, Sidney Fischgrund, then and after her husband's death, (2) her participation in the meetings when the trust was created, (3) her understanding that the trust agreement contained everything the parties intended, and

(4) the absence of any collateral agreements or understandings beyond what was contained in the trust agreement, it is clear that there is adequate support for the District Court's Finding of Fact No. 7 that taxpayer's consent to the Declaration of Trust was made with advice of counsel, and for the District Court's Finding of Fact No. 9 that the parties did not have any oral or collateral agreements concerning the trust or the property which was the res of the trust, or which were at variance with the terms of the trust, and that the trust expresses the full intent of the parties. (R. 237, 238.)

***C. Taxpayer, by her written consent to the transfer in trust of the property involved, waived any community property rights she may have had in the property prior to the formation of, and conveyance to, the trust***

***1. Kirkwood v. Bank of America supports the District Court's holding***

Appellee has been unable to find any case passing upon the question of whether a transmutation of community property to separate property occurs under facts identical to the facts in the instant case; however, a case which is nearly identical in its facts and which holds that a transmutation occurs is *Kirkwood v. Bank of America*, 43 Cal. 2d 333, 273 P. 2d 532. This case dealt with a situation wherein the husband, with the written consent of the wife, created a trust entirely of community property. The trust agreement provided that during the husband's life all net income was to be paid to him or expended in his behalf, and that if the wife survived him, the trust estate

was to be divided into two parts, designated as Part A and Part B. The wife, if she survived, was to receive the income of both parts and, in addition, was given the right to amend or revoke as to Part A. The husband retained the power to amend or revoke the trust agreement.

A question arose on the death of the husband as to the application of Section 13554 of the California Revenue and Taxation Code, which provides in the case of an *inter vivos* transfer of community property from husband to wife that only one half of the property transferred is subject to the inheritance tax. The court stated (43 Cal. 2d, p. 335, 273 P. 2d, p. 533):

The sole question to be determined is whether the widow here, who takes the major portion but less than the entire property transferred to herself and others pursuant to the terms of an *inter vivos* revocable trust created with her written consent from community assets during her husband's lifetime, is entitled to a community property exclusion to the extent of one-half of the entire property transferred in trust or only to an exclusion of one-half of the property transferred in trust to her.

The court sustained the lower court's holding that the wife was entitled to a community property exclusion only to the extent of one-half of the property transferred in trust to her. Thus, she was entitled to an exclusion of one half of the sum of (a) the value of Part A, as to which she held the power to amend or revoke, and (b) the value of her life estate in Part B. Taxpayer contends that the court treated the in-



terest which the wife received from the trust as community property in allowing her the exclusion of one-half of such amount for purposes of the California inheritance tax; however, Section 13554 applies to a gift arising out of the *transfer* of community property. The significant factor here is the court's treatment of that portion of the original community property which the widow relinquished to the trust as being transmuted to separate property. It is this portion of the community to which the court directed its attention when it stated (43 Cal. 2d, p. 339, 273 P. 2d, p. 535):

As appears from the trust agreement, the primary purpose and intent of the trustor was that the two sons should have the ultimate ownership of all the property in equal shares, with their mother entitled to at least a life interest therein, and more than that if she desired or needed it. The trust was designed to avoid probate proceedings on the death of both spouses. The husband was the transferor, with his wife's consent. \* \* \* At the time of the transfer she had the power of restraint, Civ Code, Section 172 (a), but instead of exercising it by withholding her signature, \* \* \* she, with advice of counsel signed a formal consent, to "all of the terms and conditions" of the "Trust Agreement." She thereby parted voluntarily with her expectant statutory rights in the community property as they existed before the transfer, and she succeeded to a new and different interest in the property subject to the trust upon giving her consent to the *inter vivos* disposition breaking up the community status of the property transferred.

As noted above, the facts of the instant case are substantially identical to the facts in *Kirkwood*. Both cases involve the transfer of community property to a revocable inter vivos trust, with the written consent of the wife, with the husband retaining the income for his life and the power to amend or revoke the trust. In both cases the wife had the advice of counsel.

Amicus curiae makes the argument (Br. 34, 35) that the powers of the husband in *Kirkwood* to amend or revoke the trust were powers held in a fiduciary capacity as manager of the community. If the wife retained a community interest in the rights and powers of the husband under the trust instrument, then she continued to hold a present, existing, and equal interest in the trust estate until her husband's death, and the court was in error in rejecting the wife's argument that she was entitled to exclude from the transfer an amount equal to one-half the net value of the entire trust property because that amount "already belonged to her" as community property. The suggestion that the husband's powers under the express terms of the trust agreement were held as manager of the community is certainly not in harmony with the court's statements to the effect that the community status was broken up when the wife consented to the creation of the trust and the transfer of community property thereto.

Amicus curiae seeks to distinguish *Kirkwood* from the instant case on the grounds (Br. 36) that *Kirkwood* involved pre-1927 community property while the instant case involves post-1927 community prop-



erty. For California inheritance tax purposes, no distinction is made in the treatment of community property according to whether the property was acquired before 1927 or after 1927. *Kirkwood v. Bank of America*, *supra*; *Estate of Atwell*, 85 Cal. App. 2d 454, 461, 193 P. 2d 519, 523.

The point is made by Amicus Curiae (Br. 24) that taxpayer and her husband could not have intended to convert the community property into separate property since there was a tax detriment in doing so. However, the fact that greater tax burden results from planning one way as opposed to another does not warrant reconstructing what was actually done by the parties. As was stated in *Kirkwood*, *supra* (43 Cal. 2d, p. 340, 273 P. 2d, p. 535), "When the trustor and his wife had the question of the disposition of their community property under consideration, they were chargeable with notice that the impact of the inheritance tax would depend upon the method of transfer which they chose to adopt. The choice was made voluntarily and the tax consequences must follow accordingly." In the same view, the absence of tax avoidance motives (T. Br. 46) does not change the legal effect of what was done by taxpayer and her husband.

2. *The evidence as a whole supports the District Court's finding that taxpayer, by her written consent to the creation of the trust, parted with her interest in the community property transferred to the trust*

Taxpayer makes the argument under various headings that taxpayer did not waive her community

property rights in the property transferred when she gave her approval to the creation of the trust because she lacked the requisite intent to transmute the community property into the separate property of her husband. Whether a husband and wife have agreed to transmute the character of property is a question of fact to be determined on the basis of all the evidence. Taxpayer looks to separate elements of the trust transaction, such as the husband's powers of management under the trust instrument and the taxpayer's benefits thereunder, and argues that her intent or tacit approval to transmute the community property cannot be found in such elements. The Government's argument, and the District Court's findings, are not based solely on one or more elements of the trust instrument or one or more of the circumstances surrounding its execution, but on all of the evidence. And a finding based on sufficient evidence, not inherently improbable, is conclusive on appeal. *Machado v. Machado*, 122 Cal. App. 218, 9 P. 2d 872; *Estate of Helm*, 6 Cal. App. 752, 45 P. 2d 250; 10 Cal. Jur. 2d, Community Property, Section 59. The pertinent provisions of the trust instrument and the circumstances of taxpayer's consent to the trust are discussed above and fully support the conclusion of the District Court that the taxpayer parted with her interest in the community property transferred to the trust.

In effect, the taxpayer's argument in regard to intent is that she was unaware of or mistaken about the legal effect of her consent to the transfer in trust. This is similar to the wife's position in *Schindler v.*

*Schindler*, 126 Cal. App. 2d 597, 272 P. 2d 566, in which the question was whether real property purchased with community funds and placed in joint tenancy was community property subject to disposition in the pending divorce proceedings. The court stated (126 Cal. App. 2d, p. 601, 272 P. 2d, p. 568):

It is common knowledge that innumerable husbands and wives with little or no information about estates in real property acquiesce without reflection in the suggestion that they place purchased property in joint tenancy. This estate, of course, has certain advantages. Usually not until marital discord reaches the critical stage of dividing community assets does one of the spouses—generally the one found to be innocent of wrong-doing and therefore entitled to more than half of the community property—first learn of the disadvantages of joint tenancy. At that point the issue of lack of comprehension, or absence of consent to the creation of the joint tenancy estate inevitably arises.

The court noted that the husband, despite his powers of management of the community, is subject to the limitations of California Civil Code Sections 172 and 172(a) and must have the wife's consent in transferring community funds into joint tenancy property, citing *Britton v. Hammell*, 4 Cal. 2d 690, 692. Further, the court stated (126 Cal. App. 2d, pp. 604-605, 272 P. 2d p. 570-571):

In the instant case, the wife signed the papers involved in the purchase of the property. In so doing, and in the absence of fraud or misrepresentation, she clearly participated in the trans-

action and thereby consented in writing to the transfer of community funds to joint tenancy property. Respondent further testified in response to interrogation that she "*just thought it belonged to both of us*" and believed that it was community property. There is no testimony that she revealed those evanescent thoughts to appellant or to anyone else. \* \* \*

It is of no significance that the respondent stated she was unaware of or mistaken about the legal effect of the deed. Nor is it material that the home was purchased primarily from community funds. Those facts, taken together, provide no basis for an inference of a mutual understanding or agreement between the husband and wife that the community nature of the property was to be preserved regardless of the form of the deed. (Emphasis added.)

It is noted that taxpayer in the instant case revealed a similar lack of knowledge when she stated that she did not know the difference between community property or joint tenancy. (Dep. 21-22.)

In the absence of any written or oral agreements at variance with the terms of the trust (based on taxpayer's testimony), taxpayer's consent to the trust, with the advice of attorney Sidney Fischgrund whom she trusted and subsequently employed after Mr. Katz' death, amounted to the consent required under Sections 172 and 172(a) of the California Civil Code (Appendix, *infra*).



**D. *The three principal cases relied on by taxpayer and amicus curiae do not support the contention that she retained a community interest in the trust under the facts obtaining in this case***

**1. *Commissioner v. Chase Manhattan Bank***

In *Commissioner v. Chase Manhattan Bank*, 259 F. 2d 231 (C.A. 5th), certiorari denied, 359 U.S. 913, it appeared that a husband in a community property state (Texas) created an insurance trust the principal of which consisted of insurance policies on his life. All premiums were paid out of community property. Upon his death the income was to go to his wife for life, and when she died, the principal was to go to the settlor's descendants. The husband reserved the right to revoke the trust and change the beneficiaries of the insurance. When he died, the trust became irrevocable and the rights of the beneficiaries vested. In the circumstances, the Court of Appeals held that the husband acted as manager of the community in creating the trust and held the right of revocation in that capacity. Hence the court held that the wife retained her community interest and when the husband died she made a taxable gift of half the proceeds of the insurance less only the value of her retained life estate in that half. And the court reached the same result in respect to another *inter vivos* trust created out of community property the principal of which consisted of various securities.

The *Chase Manhattan* case is clearly distinguishable from the instant case because no question as to transmutation of property from community to separate property was involved therein. Indeed, the wife

in that case did not even learn of the existence of the trusts until after the husband died; and in the circumstances there was no basis for any contention that she relinquished her community rights when the trusts were created.

In discussing *Chase Manhattan* the statement is made in the Amicus Curiae brief, at pages 16-17, that since under Texas community property law a husband can give away community property without his wife's consent as long as it is not in fraud of her rights, and since under California community property law a husband can give away community property with the wife's consent—it must follow that “the unilateral, nonfraudulent designation by a Texas husband, of a third party beneficiary under a ‘community’ insurance policy or inter vivos trust has the same effect as a similar designation by a California husband with his wife's consent or approval.” There are two aspects to this statement, one relating to life insurance policies and the other relating to *inter vivos* trusts.

With respect to life insurance, it is clear that under California community property law a wife surrenders her community property interest in the *proceeds* of a policy on her husband's life by endorsing her consent to the designation of a beneficiary other than herself. *Ettlinger v. Connecticut Gen. Life Ins. Co.*, 175 F. 2d 870 (C.A. 9th). It can be said that the wife's consent to the California husband's designation which is in effect on the death of the husband, and the Texas husband's nonfraudulent designation both result in taxable gifts from the wife upon the



husband's death, assuming other incidents of ownership of the policy had not been disposed of by the wife prior thereto. But this hypothetical tends to be misleading in that it ignores the hybrid nature of the property represented by life insurance policies, including the fact that the power to change the beneficiary is but one of the incidents of ownership of a life insurance policy, and that it is possible for the wife to release her entire interest in the policy and convert it into the separate property of the husband. This is discussed in this Court's opinion in *United States v. Stewart*, 270 F. 2d 894, 898 (C.A. 9th).

As it relates to *inter vivos* trusts, the statement quoted from the Amicus Curiae brief is significant in that it attempts to equate the designation of beneficiaries, and gift from the community which occurred when the revocable trusts created by the husband in *Chase Manhattan* became irrevocable upon his death, to the case of a transfer in trust by a California husband, with his wife's consent, with third parties designated as beneficiaries of the trust. If the reference is to a California trust which is irrevocable and not subject to amendment at the time that the wife gives her consent or approval, it is clear that the wife has consented to the gift from the community to the designated third party beneficiaries of the trust. On the other hand, if the reference is to a trust which may be amended or revoked by the husband, with third parties designated as beneficiaries, and the wife consents to its creation, as in *Kirkwood, supra*, and the instant case, it would seem clear that the wife

has consented to all the terms of the trust, including the husband's power to amend or revoke the trust, and has relinquished to her husband her interest in the community property transferred in trust, at least in the absence of evidence showing that no such relinquishment was intended.

## 2. *United States v. Stewart*

Taxpayer (Br. 22) and Amicus Curiae (Br. 5) also rely on the decision of this Court in *United States v. Stewart*, *supra*, as being contrary to the holding of the District Court in the instant case. The primary question presented in *Stewart* was whether one-half of the cash value of 26 policies on the life of the husband which had been purchased with community funds was properly includible in the wife's gross estate for federal estate tax purposes. In order to decide this question it was necessary first to determine whether the policies were community property at the time of the wife's death and, deciding this to be the case, it was necessary to analyze the nature and extent of the decedent's interests in the policies under California law.

In reaching the decision that the wife had present, existing and equal interests in the policies at the time of her death and that this amounted to ownership of one-half of the value of the policies at such time, resulting in their inclusion in her gross estate, this Court made a careful analysis of the manner in which the California community property system affects incidents of ownership in a life insurance policy. In

this connection the Court stated the principle underlying its analysis as follows (p. 898):

While life insurance, because of its hybrid nature, is necessarily accorded individualistic treatment in the law generally, this fact has apparently not been regarded by the California courts as requiring that it be treated *sui generis* for purposes of the community property laws. We find nothing in California law which indicates that life policies as items of community property are treated by rules other than or different from those pertaining to community property generally.

The taxpayer relies on *Stewart* in making the argument by analogy that a revocable *inter vivos* trust established with community property should be treated, for federal estate and gift tax purposes, the same as an annuity or insurance policy purchased by the husband with community funds. The basic fallacy of this argument by analogy is that the analysis in *Stewart* starts with the *fact* that life policies, with all their attributes, are initially items of community property if purchased with community funds, whereas taxpayer's argument utilizes the community property rules applicable to such attributes of life policies (as developed in *Stewart*) as a basis for contending that the attributes of a revocable trust should be similarly treated, without regard to whether such trust is community property in the first instance. The basic question in this case is whether Sadie Katz relinquished her interest in the community property transferred to an *inter vivos* trust when she gave her approval to the trust instrument under which her hus-

band reserved the right to the income for his life and retained the right to amend or to revoke or terminate the trust. The application of California community property law to the attributes of an insurance policy, as developed in *Stewart*, is not relevant to this case unless the subject *inter vivos* trust is an item of community property in the first instance. However, under the holding in *Kirkwood v. Bank of America*, *supra*, it is clear that Mrs. Katz relinquished her interest in the community property "upon giving her consent to the *inter vivos* disposition breaking up the community status of the property transferred." 43 Cal. 2d, p. 339, 273 P. 2d, p. 535. If Mr. Katz had terminated the trust, the trust estate would have vested in him as his separate property, not as community property. If Mr. Katz had established the trust with community funds without the consent of his wife, as did the husband in *Chase Manhattan*, *supra*, he would be regarded as acting for the community, and upon termination of the trust the trust estate would have vested in Mr. Katz as community property. However, it is of no avail to taxpayer to argue the tax consequences contrary to the realities of this case.

### 3. *Estate of McGowan v. Commissioner*

Amicus Curiae cites *Estate of McGowan v. Commissioner*, 43 B.T.A. 695, appeal dismissed, 123 F. 2d 64 (C.A. 9th), as holding in effect that community property transferred to a revocable trust retains its character as community property. (Br. 20-22.) This estate tax case involved the transfer of two parcels



of real estate to a revocable inter vivos trust in 1929. One parcel was the husband's separate property and there was a question as to the respective interests of the husband and wife in the other parcel. Subsequent to the transfer in trust the parties entered into an agreement that all their property be held in community. The husband died in 1937, and the Government included the entire trust property in the decedent's estate under Section 302(d) of the Revenue Act of 1926, as amended by Section 805 of the Revenue Act of 1936. The pertinent statute provides for inclusion in the gross estate to "the extent of any interest therein of which the decedent has at any time made a transfer" where the enjoyment thereof was subject to any change through the exercise of a power by the decedent to alter, amend, or revoke, etc. The Board of Tax Appeals held that the transfer of the separate parcel by a revocable trust was not affected by the subsequent community property agreement and was includible in the decedent's estate. See *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85. It also held that the same reasoning applied to the transfer by revocable trust of the other parcel of real estate to the extent of the decedent's interest. The Board stated (p. 699) that the extent of such interest "depends upon the proportions of the investment in the tract which decedent, his wife, and the marital community contributed." The Board went on to find that the wife's separate funds were the source of one-ninth of the purchase price and the "other eight-ninths was community property until the transfer in

trust.” On this basis the Board found that the decedent’s transfer under Section 302(d) was one-half of the community contribution, or four-ninths of the parcel, and the latter proportion was includible in his estate. In determining the amount transferred to the revocable trust by the decedent which was subject to Section 302(d), the Board was not concerned with the character of the property after its transfer in trust, and thus the inference drawn in the *Amicus Curiae* brief at page 22 with respect to the character of the trust property is clearly erroneous.

**E. *The trust involved was validly created***

Taxpayer is urging as ground for reversal a point not raised in the court below.<sup>2</sup> Taxpayer for the first time raises a question as to the validity of the trust created by Leroy J. Katz with taxpayer’s consent on August 24, 1956. (Br. 36.) Taxpayer recognizes that the retention by Leroy J. Katz of the right to the income of the trust and retention of the power to amend or revoke the trust, either alone or in combination, do not affect the validity of an inter vivos trust in California. *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089. (Br. 37.) However, taxpayer urges that because of the control over the trust administration reserved by Leroy Katz in Section Four of the Declaration of

---

<sup>2</sup> It is at least doubtful whether taxpayer should be permitted to raise this point on the instant appeal and we submit she should not. *General Utilities Co. v. Helvering*, 296 U.S. 200; *Bank of California v. Commissioner*, 133 F. 2d 428, 433 (C.A. 9th). In any event, the point is without merit, as we have shown above.



Trust no effective trust was created. (Br. 38-40.)  
Section Four provides (R. 64) :

During the lifetime and competency of the Trustor, the Trustee shall have no rights, duties, or powers with respect to any property held under this trust, it being understood that the trustor retains all such rights, and shall collect, receive, and disburse, without accounting to the Trustee or any other person, all income of every nature and description from the real and personal property held hereunder.

The Trustee shall not exercise any of the powers set forth in SECTIONS ONE, TWO, AND THREE hereof without first obtaining the written consent of the Trustor, during his lifetime, and after his death without first obtaining the written consent of all of the adult beneficiaries who are then entitled to receive the income hereunder.

To construe the first paragraph of Section Four as providing that the trustee actually had no rights, duties, or powers with respect to any property during the trustor's lifetime, as contended by taxpayer (Br. 39), is inconsistent with the provision in the second paragraph that the trustee shall not exercise the powers in Sections One, Two, and Three, the sections defining the trustee's administrative powers, "without first obtaining the written consent of the Trustor, during his lifetime \* \* \*." Obviously, there is no point in providing that the trustee shall obtain the trustor's written consent before exercising powers if it cannot exercise such powers in any event during the trustor's lifetime, which is the case if the first paragraph of Section Four is read literally. Section

Fourteen provides: "At the time when the Trustee assumes *full* management of this trust, the following powers are conferred upon the Trustee \* \* \*." (R. 69.) The inference is clear that the trustee had some management function prior to the time when Section Fourteen became effective on the death of Leroy Katz. It is also provided that the trustee shall receive an annual fee of \$360 during the trustor's lifetime. (R. 70.) Such a fee is more than the fee of a mere custodian of securities or the cost of a safe deposit box.

In view of the above described ambiguity of the trust instrument as to the trustee's administrative duties, the burden was on taxpayer to introduce evidence as to the intent of the parties with regard to the trustee's duties, in particular to show what duties the trustee actually performed during Mr. Katz' lifetime. Taxpayer's failure to raise this issue in the court below perhaps accounts for this omission. The record does indicate that the trust res was never a part of the estate of Leroy Katz for other than tax purposes. The District Court in its Finding No. 12 indicates that taxpayer failed to assert any right she may have had to set aside the trust and is accepting benefits under the trust. (R. 238.)

Assuming, as taxpayer contends (Br. 39), the trustee held bare legal title to the trust res during Mr. Katz' lifetime, subject to an obligation to reconvey or transfer the property as requested by Mr. Katz, the trust is still regarded as a valid trust under California law. *Reiss v. Reiss*, 45 Cal. App. 2d 740, 746, 114 P. 2d 718, 722; *Hansen v. Bear Film*

*Co.*, 28 Cal. 2d 154, 172, 168 P. 2d 946, 958. The trend in California and elsewhere is to recognize the validity of an inter vivos trust despite the retention of powers to amend, revoke, and control the trust during the trustor's lifetime. Bogert, *Trusts and Trustees* (2d ed.), Sec. 104; 1 *Restatement of Trusts* (2d), Sec. 57; 164 A.L.R., Annotation, 881, 889. In *Monell v. College of Physicians & Surgeons*, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744, the court cites with approval Section 57 of the *Restatement of Trusts* (2d).

Arguing that a dry trust was created, taxpayer asserts that the interest of the settlor, the trustee, and the beneficiary are the same under the instant Declaration of Trust. (Br. 40.) In doing so, she ignores the fact that the Declaration of Trust vests specific interests in her and the children of taxpayer and Mr. Katz, subject to divestment under Mr. Katz' powers to amend or revoke the trust. The reservation of a power of revocation in the settlor does not prevent the vesting of an interest in the beneficiary, although it is an interest subject to be divested by the exercise of the power. 1 *Scott, Trusts* (2d ed.), Sec. 57.1.

Viewing the trust instrument as a whole, the circumstances of its execution and administration, including taxpayer's consent thereto, and the fact that taxpayer treated the trust as a valid trust and is accepting benefits thereunder, the trust involved here must be regarded as a valid trust for purposes of the instant appeal.

## II

**In the Alternative, the Portion of the Trust Property Attributable to Taxpayer's Interest in Community Property Transferred to the Trust Is Includible in the Gross Estate of Decedent, Leroy J. Katz, under Section 2041 of the Internal Revenue Code**

Since the decedent had the right to the trust income and the power to revoke the trust during his lifetime, the entire trust property is clearly includible in his gross estate for purposes of the federal estate tax under Sections 2036 and 2038 of the 1954 Internal Revenue Code if, as held by the District Court and contended by us above, the entire property placed in the trust became his separate property by agreement of the spouses.

However, even if the wife continued to be the owner of a community one-half of the property, and thus placed it in the trust herself, still, she gave to the decedent such broad powers over her share as to constitute a general power of appointment within the meaning of Section 2041 of the 1954 Internal Revenue Code and Section 20.2041-1 of the Treasury Regulations on Estate Tax (1954 Code) (Appendix, *infra*).

There can be no question that the clear language of Sections Four and Thirteen of the Declaration of Trust gave Leroy Joseph Katz the power to affect both the beneficial enjoyment of the trust property and its income by altering, amending, or revoking the trust, and also the power to withdraw trust corpus during his lifetime. By taxpayer's appending her signature of approval to the Declaration of Trust,



she vested in her husband, Leroy J. Katz, a general power of appointment over her share of the trust corpus.

Under the requirements of Section 2041 of the Internal Revenue Code of 1954 the value of the gross estate shall include the value of all property to the extent to which the decedent had, at the time of his death, a general power of appointment. Leroy J. Katz had a general power of appointment over the entire trust res, and it must therefore be fully includible in his gross estate. Cf. *Phinney v. Kay*, 275 F. 2d 776 (C.A. 5th).

In view of its disposition of the case, holding that there was a transmutation of community property so that all the trust property became the separate property of the decedent, it was unnecessary for the District Court to reach our alternative point as to Section 2041, and it did not do so. However, we wish to reserve the point and submit that the decision of the District Court should be sustained on that ground even if this Court should hold that the wife retained a one-half community interest in the property placed in the trust.

## CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,  
*Assistant Attorney General.*

LEE A. JACKSON,  
LORING W. POST,  
ROBERT M. WILLAN,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

*Of Counsel:*

JOHN K. VAN DE KAMP,  
*United States Attorney.*

LOYAL E. KEIR,  
DONALD M. FENMORE,  
*Assistants United States Attorney.*

JANUARY, 1967.

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:..... day of ....., 1967.

---

ROBERT M. WILLAN  
*Attorney*



## APPENDIX

Civil Code, 6 West's Annotated California Codes:

Sec. 172 *Community personal property; management and control; restrictions on disposition.*

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

Sec. 172a *Community real property, management and control; wife's joinder in conveyances; limitation of actions.*

The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; *provided, however*, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; *provided, also, however*, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real prop-

erty, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

#### Internal Revenue Code of 1954:

##### SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 2036.)

#### SEC. 2038. REVOCABLE TRANSFERS.

(a) *In General*.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States)—

(1) *Transfers after June 22, 1936*.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 2038.)

## SEC. 2041. POWERS OF APPOINTMENT.

(a) *In General*.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States)—

\* \* \* \*

(2) *Powers created after October 21, 1942*.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, \* \* \*

\* \* \* \*

(b) *Definitions*.—For purposes of subsection (a)—

(1) *General power of appointment*.—The term “general power of appointment” means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 2041.)

Treasury Regulations on Estate Tax (1954 Code) :

Sec. 20.2041-1 *Powers of appointment; in general*.

\* \* \* \*

(b) *Definition of “power of appointment”*—

(1) *In general*. The term “power of appointment” includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume the

principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a decedent to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust is a power of appointment. \* \* \*

\* \* \* \*

(26 C.F.R., Sec. 20.2041-1.)



NO. 21119

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellee.

---

APPELLANT'S REPLY BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

FILED

FEB 17 1967

WM B. LUCK, CLERK

NORTON A. KESTEN and  
LEVINSON, MARCUS & BRATTER

8500 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellant





N O. 2 1 1 1 9

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al. ,

Appellee.

---

APPELLANT'S REPLY BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

NORTON A. KESTEN and  
LEVINSON, MARCUS & BRATTER

8500 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellant



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I COMMUNITY PROPERTY LAW DOES NOT DICTATE NOR DIRECT THAT A TRANSMU- TATION OCCURRED.	1
A. THE GOVERNMENT'S HEAVY RELIANCE ON THE <u>METZGER, SCHINDLER, AND</u> <u>SPRECKELS CASES</u> IS UNWARRANTED.	2
B. TAXPAYER DID NOT CONSENT TO THE DECLARATION OF TRUST.	5
C. APPELLANT DID NOT HAVE THE BENEFIT OF INDEPENDENT COUNSEL.	5
D. APPELLANT'S "CONSENTS" TO AMEND- MENTS TO THE TRUST MANIFEST HER CONTINUING COMMUNITY INTEREST IN THE TRUST RES.	6
E. THAT THE DEPOSITION AFFIRMS RATHER THAN NEGATES THAT THE INTENT OF THE APPELLANT AND OF THE DECEASED WAS TO MAINTAIN THE TRUST RES AS COMMUNITY PROPERTY.	7
II TAX LAW DOES NOT DICTATE NOR DIRECT THAT A TRANSMUTATION HAS OCCURRED.	9
III A. THE QUESTION OF THE VALIDITY OF THE TRUST INSTRUMENT IS PROPERLY BEFORE THE COURT AT THIS TIME.	16
B. THE TRUST INSTRUMENT IS INVALID.	17
IV THE INTEREST OF APPELLANT IN THE TRUST PROPERTY IS NOT INCLUDABLE IN THE GROSS ESTATE OF LEROY J. KATZ UNDER SECTION 2041 OF THE INTERNAL REVENUE CODE.	19
CONCLUSION	21
CERTIFICATE	22
APPENDIX - California Civil Code, §157 and §163	A-1



# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (C.A. 5th), cert.den. 359 U.S. 913	12, 14, 15, 16, 20
DeMartini v. Allegretti (1905), 146 Cal. 214, 79 Pac. 871	18
Ettlinger v. Connecticut General Life Insurance Co., 175 F.2d 870 (C.A. 9th, 1949)	14
Gregory v. Gregory (1949), 92 Cal. App. 2d 343, 206 P.2d 1122	6
Hansen v. Bear Film Co., 28 Cal.2d 154, 168 P.2d 946	17
Kirkwood v. Bank of America (1954), 43 Cal.2d 333, 273 P.2d 532	9, 10, 11, 12, 13
Lahaney v. Lahaney (1929), 208 Cal. 323, 281 Pac. 67	12
Lang v. Commissioner, 304 U.S. 264 (1938)	20
Metzger v. Vestal (1935), 2 Cal.2d 517, 42 P.2d 67	2, 3, 4
Monell v. College of Physicians and Surgeons, 198 Cal. App. 2d 38, 17 Cal. Rptr. 744	18
Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966	18
Noble v. Learned (1908), 153 Cal. 245, 94 Pac. 1047	18
Phinney v. Kay (5th Cir. 1960), 275 F.2d 776	20
Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P.2d 718	17
Rickenberg v. Commissioner of Internal Revenue, 177 F.2d 114 (9th Cir. 1949)	20
Schindler v. Schindler (1954), 126 Cal. App. 2d 597, 272 P.2d 566	2, 3, 4





Page

Spreckels v. Spreckels (1897), 116 Cal. 339, 48 Pac. 228	12
Spreckels v. Spreckels (1916), 172 Cal. 775, 158 Pac. 537	2, 4
Stewart v. Stewart (1926), 199 Cal. 318, 249 Pac. 197	12
United States v. Goodyear (9th Cir. 1938), 99 F.2d 523	20
United States v. Stewart, 270 F.2d 894 (C. A. 9th)	13, 14, 15
Vai v. Bank of America (1961), 56 Cal.2d 329, 364 P.2d 247, 15 Cal. Rptr. 71	6

Statutes

California Civil Code:

§157	4, A-1
§161(a)	4
§163	4, A-1
§172	2
§172(a)	2

Revenue and Taxation Code:

§§13551 - 13556	10
§13554	10
§13805	10

Internal Revenue Code:

§2036	19, 20
§2038	19, 20
§2041	19, 20



Text

Restatement of Trusts 2d,  
American Law Institute, §57

18



N O. 2 1 1 1 9

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SADIE KATZ,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

---

APPELLANT'S REPLY BRIEF

---

I

COMMUNITY PROPERTY LAW DOES NOT  
DICTATE NOR DIRECT THAT A TRANSMU-  
TATION OCCURRED.

---

The Government's position that the necessary legal effect of the taxpayer's approval of the trust instrument was to part with her community interest in the property transferred to the trust is inaccurate in law and in fact. The Government mistakenly relies on three cases which have previously been analyzed in Appellant's Opening Brief. These cases are summarized as follows:





A. THE GOVERNMENT'S HEAVY RELIANCE  
ON THE METZGER, SCHINDLER, AND  
SPRECKELS CASES IS UNWARRANTED.

---

1. Metzger v. Vestal (1935), 2 Cal. 2d 517, 42 P. 2d 67.

In both the Metzger case and this case (hereinafter referred to as the Katz case, for clarity) the issue of consent by the wife to a transmutation is raised. Parenthetically, it is to be noted that Appellant approved rather than consented to the original trust instrument.

In the Metzger case the court specifically indicates that its decision is founded upon a determination that there was an underlying oral agreement to transmute between the spouses, a fact which the District Court found did not exist in the Katz case.

Another distinction between the Metzger case and the Katz case is that Metzger refers to personal property. The pages annexed to the trust declaration which is the subject of this dispute show that both real and personal property were made a part of the trust res. It is to be noted that there is a distinction between real property and personal property under the California community property system. This distinction is noted in those provisions of the code dealing with the husband's management and control of the community property, to wit, California Civil Code §172 and 172(a). The effect of Civil Code §172 is to restrict the husband's power to transfer community personalty. Civil Code §172(a) likewise restricts the husband's power to dispose of the community real property, but is to be even more strictly interpreted than the



personal property section because of the necessity that the wife must join in writing in any conveyance of real property.

A further distinction between the Katz case and the Metzger case is that Metzger discusses an improper gift. In conformity with this assertion, the Court in the Metzger case held:

" . . . when the corporation was formed, it is contended, in substance, that there was an improper diversion or gift of community property without the written consent of the wife, Plaintiff's assignor.

There is no merit in the contention." Metzger v. Vestal, supra, 42 P.2d at page 69.

In the Metzger case certain assignees of the wife's creditors sought to set aside a transfer of community property from the husband to their son. The distinction to be made is that in the Katz case no attempt has been made by the Government to argue that Appellant had any intent to make a gift. It would follow that if Metzger is a case discussing when a wife or her creditors may set aside a gift of community property by the husband, it is far different in its legal effect from an alleged consent or approval to transmute community property to separate property.

2. Schindler v. Schindler (1954), 126 Cal. App.2d 597, 272 P.2d 566.

The Government apparently does not understand certain basic concepts of California community property law. Where property is community property, the wife retains a vested interest



therein. (California Civil Code Section 161(a)). Where the property is the husband's separate property, the wife has no interest therein. (California Civil Code Sections 157 and 163). The transmutation in the Schindler case is from the wife's separate property to community property. However, in the Katz case, the purported transmutation flows the other way and is allegedly from community property to the husband's separate property thus depriving the wife of her vested statutory interests therein. (California Civil Code Section 161(a)).

This factual distinction is so basic that any reliance on the Schindler case is non-persuasive.

3. Spreckels v. Spreckels (1916), 172 Cal. 775,  
158 Pac. 537.

In the Katz case there is no issue of fact relating to a gift. California law, as is found in the Metzger case and in the Spreckels case, allows the wife to avoid a gift if she has not consented thereto or if there has been no consideration therefor. This position is entirely consistent with Appellant's position in the Katz case. But, the need to protect a wife by requiring either consideration for transfers by the husband of community property, or her consent thereto in the case of a gift, bears no factual application to the Katz case, because no intent to transfer by gift has been previously relied upon by the Government.





B. TAXPAYER DID NOT CONSENT TO  
THE DECLARATION OF TRUST.

---

As indicated in Appellant's Opening Brief, Appellant approved the declaration of trust; she did not consent thereto.

Appellant placed considerable emphasis in her Opening Brief on the powers of management of the community inherent in a husband pursuant to the California community property system. This argument is stated on pages 7, 8, 9, 10 and 11 of Appellant's Opening Brief. The point which Appellant sought to present was that Mrs. Katz had no alternative other than to go along with her husband's trust program. The Government has not seen fit to answer this argument.

Thus Appellant's position is that Mrs. Katz' "approval" of the trust instrument was only a reflection of her duty to acquiesce in her husband's management of the community. This acquiescence is illuminated by the use of the word "approval" rather than the word "consent".

C. APPELLANT DID NOT HAVE THE  
BENEFIT OF INDEPENDENT COUNSEL.

---

The trust instrument sets forth the fact that Appellant's deceased husband Leroy J. Katz was the Trustor, and that Mr. Fischgrund is the attorney for the Trustor.

Appellee asserts in its brief that Mr. Fischgrund was in



effect relied upon as the attorney for both the Trustor and Appellant.

Appellant's confidence or faith in Fischgrund at the time of the creation of the trust is no substitute for capable independent counsel. Her utilization of Fischgrund's services after Mr. Katz' death does not establish that she had independent legal counsel when the trust was created.

Appellant cited Gregory v. Gregory and Vai v. Bank of America, at pages 20 to 21 of her opening brief, as authority for the proposition that the wife must be represented by capable independent legal counsel. The Government's failure to reply to Appellant's citations of these cogent authorities suggests the Government's inability to effectively argue that Appellant had the benefit of capable independent counsel.

D. APPELLANT'S "CONSENTS" TO AMENDMENTS TO THE TRUST MANIFEST HER CONTINUING COMMUNITY INTEREST IN THE TRUST RES.

---

Appellant has advanced the argument that if Appellant's approval (the original trust instrument was approved by the wife although she consented to subsequent amendments) totally divested her of any rights in the trust res, then she would not have been requested on two subsequent occasions to sign consent to amendments to the trust instrument. It would only be consistent with the Government's position that once Mrs. Katz approved the original declaration of trust, she had no rights in the trust res. The



District Court found that the original declaration of trust acted as an instrument of transmutation from community property to the husband's separate property. In reaching its decision on the cross motions for summary judgment in favor of the Government, the District Court failed to take into consideration the obvious intent of Mr. and Mrs. Katz to deal with the trust res as community property as is necessarily reflected by the requirement that Mrs. Katz consent to amendments. If one adopts the Government's position these consents were unrequired because they were after the fact.

E.        THAT THE DEPOSITION AFFIRMS  
             RATHER THAN NEGATES THAT THE  
             INTENT OF THE APPELLANT AND  
             OF THE DECEASED WAS TO MAIN-  
             TAIN THE TRUST RES AS COMMUNITY  
             PROPERTY.

---

In 1916 Appellant married Leroy J. Katz (Dep. p. 4, lines 25-26). Forty-four years later, Mr. Katz died. Appellee concedes (for purposes of the motion for summary judgment) that the property contributed to the trust was community property.

In 1940 Appellant and decedent moved to California (Dep. p. 6, line 26; p. 7, line 1). There is no evidence before this Court to indicate anything but a record of domestic tranquility between Appellant and her husband.

Appellant relied upon her husband's business discretion.

For example:





"Q. Did you both decide as to what investments to purchase?

"A. No, I had faith in my husband's judgment." (Dep. p. 14, lines 14-16).

Sometime in 1956, Appellant and her late husband attended meetings at Title Insurance and Trust Company concerning the creation of an inter vivos trust.

It is interesting to note that nothing of record in this case illustrates anything but complete reliance upon and confidence by Appellant in Mr. Katz's management of the community property affairs.

At these first meetings at Title Insurance and Trust Company, the character of the trust res was discussed:

"Q. Was there any discussion at these meetings as to what the character of the property was, that is, was it separate property or was it community property?

"A. It was community property. It was our property, my husband's and my own." (Dep. p. 15, lines 21-25).

"Q. Do you remember at these meetings whether or not the question was asked by the trust officer, is this separate property or community property?

"A. There would be no reason for him



asking it. He knew it was our property." (Dep. p. 15, line 26 to p. 16, line 4).

After the trust was established, Appellant and decedent continued to consider the trust as a community venture.

"Q. Now, after they were transferred to the trust, did Mr. Katz have anything in his name that remained outside of that trust?

"A. It was in our name. It wasn't in his name, whatever we had." (emphasis added) (Dep. p. 17, lines 2-6).

"Q. When you transferred this property into the trust, did you have any kind of an understanding as to (who) [sic] owned the property?

"A. It was our property." (emphasis added) (Dep. p. 18, lines 2-5).

## II

TAX LAW DOES NOT DICTATE NOR DIRECT  
THAT A TRANSMUTATION HAS OCCURRED.

---

A. Kirkwood v. Bank of America (1954),  
43 Cal. 2d 333, 273 P. 2d 532.

In the Kirkwood case, the California Supreme Court did say, ". . . she [the wife] succeeded to a new and different interest in the property subject to the trust upon giving her consent to the



inter vivos disposition breaking up the community status of the property transferred". The Court did not say that the community property transferred to the trust became the husband's separate property, and the Court also did not say the wife retained no community interest in the trust as opposed to the property transferred to the trust. The Kirkwood case is one involving the construction of Section 13554 of the California Revenue and Taxation Code, which is one of a series of code sections (Sections 13551 through 13556) dealing with the taxation of community property upon the death of a husband under different methods of transfer from a husband to his wife. It is not a section dealing with the taxation of separate property. Separate property is considered in Revenue and Taxation Code Section 13805.

Thus, if the California court had construed the trust in the Kirkwood case to create separate property out of what had formerly been community property it would have addressed itself to the taxation of separate property under Section 13805.

The federal estate tax does not vary with different methods by which community property is transferred between husband and wife.

The federal estate tax taxes those interests in property which the husband owned at the time of his death, rather than those interests which his wife received as a result of his death. If the Kirkwood case had concerned itself with the federal estate tax payable on the death of the husband rather than the inheritance tax, the conclusion by the California court that the wife retained a





community interest in the trust, as distinguished from the assets contributed to the trust, would require that one-half of the value of the trust corpus be excluded from the husband's gross estate.

The difference between an inheritance tax case such as Kirkwood and the Katz case is illustrated by the fact that the results in the Katz case turn on the rights of the spouses in the property up to and at the time of the husband's death, whereas in the inheritance tax case, as the Court in Kirkwood pointed out, there the tax problem did " . . . not concern the wife's interest in the community property before the transfer but rather the interest which she received on her husband's death by virtue of the transfer, to which she gave her written consent." Id. at 339.

The Government argues (Brief, p. 17) that if the wife in Kirkwood retained a community interest in the rights and powers of the husband in the trust when she continued to hold a "present existing, and equal interest" in the trust estate until her husband's death and the Court was in error in rejecting her argument that she was entitled to exclude from the transfer an amount equal to one-half of the net value of the entire trust property because that amount already belonged to her as community property. While this is an inaccurate statement of the Kirkwood case, as hereinafter pointed out, it is an excellent statement of Appellant's case and under estate tax law requires a judgment in Appellant's favor. However, as regards the Kirkwood case, this statement is erroneous in at least two respects. First, the wife in Kirkwood did not have a "present, existing and equal



interest' in the trust estate until her husband's death because her community interest was based on the community property law of the State of California as it existed prior to 1927, and therefore, her interest in the trust was a "mere expectancy" until her husband's death. Lahaney v. Lahaney (1929), 208 Cal. 323, 281 Pac. 67; Spreckels v. Spreckels (1897), 116 Cal. 339, 48 Pac. 228; Stewart v. Stewart (1926), 199 Cal. 318, 249 Pac. 197. Second, the tax problem in Kirkwood did " . . . not concern the wife's interest in the community property before the transfer but rather the interest which she received on the husband's death by virtue of the transfer to which she gave a written consent." 43 Cal. 2d at 339, 273 P. 2d at 535.

B.        Commissioner v. Chase Manhattan Bank,  
259 F. 2d 231, (C. A. 5th) cert. denied,  
359 U. S. 913.

In discussing the Chase Manhattan case, supra, (Appellee's Brief, pp. 22 through 27), the Government carries forward its mistaken analysis of Kirkwood as a basis for differentiating Kirkwood and Chase Manhattan and the Katz case. At page 27 of its brief, the Government restates its premise that the California court in Kirkwood determined that the trust became the separate property of the husband when the wife relinquished her interest in the community property "upon giving her consent to the inter vivos disposition breaking up the community status of the property transferred". However, as indicated above, the Kirkwood case concerns California inheritance tax on two alternative methods of





disposing of community property; it does not deal with inheritance tax on separate property. The government fails to realize in analyzing the Kirkwood case, that the Court there treats the rights and powers of the husband in the trust as being community rights and powers.

C. United States v. Stewart, 270 F.2d 894 (C. A. 9th).

In the Stewart case, this Court indicated its appreciation of this difference, where at page 902 of the opinion it stated that the interests in one of the four matured annuity policies were community rather than separate property and that the wife's endorsement of the policy "did not in our opinion constitute a surrender of her interest in the policy" (Id. at p. 898).

In Stewart, this Court stated that, notwithstanding its hybrid nature, life insurance has not been regarded by the California courts as requiring it to be treated sui generis for purposes of California community property laws. The Government argues that the Stewart decision is not applicable unless the inter vivos trust "is an item of community property in the first instance" (Brief, page 27), and that the Kirkwood case held that such a trust is not community property. This line of reasoning is erroneous in that Kirkwood did not reach the conclusion the Government seeks to read into it; in fact it reached the opposite conclusion.

The Government, taxpayer and Amicus Curiae have been unable to find any case other than Kirkwood which deals with the nature of the interests created by the establishment of a revocable inter vivos trust of California community property. In the absence





of any authority requiring such interests to be treated differently from other types of community property, they should be treated the same as other types of community property. Such a result would be in accord with the public policy of the courts and in accord with the expectations of others situated similarly to the taxpayer.

To paraphrase *Amicus Curiae* in its analysis of the Chase Manhattan and Stewart cases, a differentiation should be made between the interests in the community as between the husband and wife, and as between the community and third parties. The result of the wife's approval in the Katz case, while binding upon the community in its relationship to third parties, does not and should not affect the interests of the husband and wife as members of the community. This position is supported by the holding of this Court in the Stewart case and in the case of Ettlinger v. Connecticut General Life Insurance Company (1949) (C. C. A. 9th), 175 F. 2d 870 in which this Court held that the wife's ratification of the beneficiary designation of an insurance policy by the husband is not intended to alter the community rights between her husband and herself during her husband's lifetime unless the contract specifically provides for such an alteration. In considering this question in the Stewart case, this Court said, " . . . in effect the joinder of the husband and wife in this settlement agreement constituted a transfer by the community under which the community retained for its life or the life of the survivor the right to income from the property".

*Amicus Curiae* (Brief, page 16) aptly argues by analogy



that nonfraudulent transfers by a Texas husband of community property and transfers by a California husband of community property with the wife's consent are essentially equivalent as relates to the interests between the husband and wife. That argument need not be repeated here.

The Government's argument in its Brief at pages 22 and 23 is that the wife's absence of knowledge in the Chase Manhattan case makes it clearly distinguishable from the Katz case. That argument is logically insufficient. Because of the difference in local community property law, the approval of Mrs. Katz was required to make the creation of the trust legally sufficient, where, as in this case, the trust corpus included real property. That approval in no way indicates that as between Mr. and Mrs. Katz there was any intent to change the community rights and duties of the husband and wife. In the Chase Manhattan case, the controlling question before the Court was whether or not there was a transmutation of the community property of the husband and wife into the separate property of the husband. At pages 236 and 244, the Court states this fact, and goes on to hold that there was no transmutation of the community property into the husband's separate property. That holding and the holding in the Stewart case, under the facts here involved, require the reversal of the trial court's judgment.



### III

#### A. THE QUESTION OF THE VALIDITY OF THE TRUST INSTRUMENT IS PROPERLY BEFORE THE COURT AT THIS TIME.

---

The Court succinctly stated in the Chase Manhattan case, supra, at page 237, that while the Commissioner of Internal Revenue owed a duty to the United States of America to litigate zealously to collect taxes, he also owed a duty to all taxpayers to see that the law was applied justly and had, " . . . no vested right in an opponent's error, in the lower Court".

The purported ambiguity in the Trust, asserted by the Government on pages 30 and 31 of its Brief, is certainly subject to interpretations other than the one the Government has set forth. The second paragraph of Section Four, of the Trust, does not contradict the first paragraph. The Government asserts that the Trustee must have had the power to administer the trust. The Government argues that because the Trustee could not exercise any powers during the Trustor's lifetime without his written consent, by inference, the Trustee must then have had some powers to administer during the Trustor's lifetime. A more logical construction is that that paragraph is intended to reinforce the position that all of the powers of the administration of the Trust were reserved by the Trustor, and " . . . the Trustee shall have no rights, duties, or powers with respect to any property held under this trust . . ." (Paragraph 1, of Section 4 of Trust). The





Government's argument is therefore totally without foundation, and the Government fails to assert any convincing argument that the Trustee, Title Insurance and Trust Company, was anything other than the mere custodian of the legal title to the trust property.

Even if the Government's view is accepted, it only raises itself to the level of establishing the existence of an ambiguity in the trust instrument which, under any circumstances, would require a trial on the merits of this matter so that evidence could be introduced to resolve the ambiguity.

B. THE TRUST INSTRUMENT IS  
INVALID.

---

1. Reiss v. Reiss, 45 Cal. App. 2d 740, 114 P. 2d 718, cited by the Government, is clearly distinguishable from the Katz case in that the trust referred to in the Reiss case did not discuss the issue of the reservation of the power to control and administer the trust by the trustor as exists in the trust in the Katz case. Reiss only sets forth the principle that a trust will not be found invalid if the trustee is not required to exercise an active duty, but is only obligated to reconvey the property to the grantor upon demand, or to otherwise encumber it for the benefit of the grantor.

2. Hansen v. Bear Film Co., 28 Cal. 2d 154, 168 P. 2d 946, also cited by the Government, is distinguishable from the Katz case on the same grounds which distinguish the Reiss case from the Katz case.



Cal. App. 2d 38, 17 Cal. Rptr. 744 cited by the Government does not significantly advance its position. The holding of the Court in the Monell case was that an agency was created rather than a trust, and therefore an invalid testamentary disposition resulted. Furthermore, a factual parallel between the Monell and the Katz cases cannot be drawn. Not only was an agency found in the Monell case but also the terms of the agent's authority were limited to paying certain medical bills, and then upon the death of the purported settlor, the remaining funds were to be turned over to a third person. Mr. Katz, however, reserved in total the right to deal with the property as he desired, and he was accountable to no other person. The purported Trustee had no power to deal with the property in any manner during Mr. Katz's lifetime, other than to be the mere custodian of the legal title to the purported trust property.

The California courts have not, so far as Appellant is able to ascertain, ruled on the approval or disapproval of Section 57 of the Restatement of Trusts (2d), American Law Institute. Therefore, the rules gleaned from De Martini v. Allegretti (1905), 146 Cal. 214, 79 Pac. 871 and Noble v. Learned (1908), 153 Cal. 245, 94 Pac. 1047, are the only expressions by the California courts on this issue, and they are consistent with the rule set forth in Newman v. Dore, 275 N. Y. 371, 9 N. E. 2d 966. The principle set forth in the Newman case is that a purported trust is invalid where a purported settlor reserves the power to amend or revoke





the trust, retains a beneficial life interest, and in addition, retains the power to control the Trustee in the administration of the trust. Mr. Katz's retention of the total power to deal with the trust property during his lifetime without the necessity of accounting to any other person creates the fatal defect rendering the Katz trust invalid.

#### IV

THE INTEREST OF APPELLANT IN THE  
TRUST PROPERTY IS NOT INCLUDABLE IN  
THE GROSS ESTATE OF LEROY J. KATZ  
UNDER SECTION 2041 OF THE INTERNAL  
REVENUE CODE.

---

Appellant contends that upon the transfer to the trust of the community property of Appellant and her deceased husband, her deceased husband held certain powers enumerated in the trust on behalf of the community and that his right to exercise these powers was coextensive with the powers given to a husband by statute to deal with the community property.

Appellant has argued in her opening brief, Section VII, pages 32, et seq. that the powers which the decedent held pursuant to the trust instrument were held by him as agent for the community and were powers belonging to the community and not to the decedent as his separate property. If that position is valid, then it follows that Section 2041 of the Internal Revenue Code is no more applicable to the question here presented than Sections 2036 and 2038.



THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE  
1100 EAST 58TH STREET, CHICAGO, ILL. 60637  
TEL. 773-936-5000

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
AND ARCHITECTURE  
AND THE MUSEUM OF ART AND ARCHITECTURE

If the estate is liable under Section 2041, it is also liable under Sections 2036 and 2038. The Government has failed to reply to Appellant's argument in this regard. In its brief (page 33) in arguing Section 2041, the Government is unable to cite any cases as authority for its position, or to distinguish the cases cited by Appellant. The only case referred to by the Government, and that for comparison's sake only, is Phinney v. Kay (5th Cir. 1960), 275 F.2d 776, which is a case involving the possession of a general power of appointment by a surviving spouse over her deceased husband's interest in the community property as granted to her in their joint and mutual will. That case is not authority for the imposition of tax under Section 2041 in the Katz case, for the reason that it is factually totally unrelated to the Katz case. In Phinney, the husband predeceased the wife and upon her subsequent death a tax was assessed on both halves of the community property. The theory relied upon was that the rights granted to the wife in Texas community property under a joint and mutual will amounted to complete ownership.

More relevant to the question here involved are the cases cited by Appellant in her opening brief, at page 32 et seq. United States v. Goodyear; Lang v. Commissioner and Rickenberg v. Commissioner of Internal Revenue. That argument need not here be repeated. It is sufficient to say that under the holding in those cases and the Chase Manhattan case, if Mr. Katz had exercised his powers to alter, amend, or revoke the trust, he would have done so as agent for the community. Appellant contends that the



alteration or amendment of the trust would require the written consent of Mrs. Katz, a practice which the parties in fact followed in the case of both amendments made to the trust. Had Mr. Katz elected to revoke the trust, it would have resulted in the substitution of the trust res as a community asset in place of the community interest in the trust rights and powers.

### CONCLUSION

After years of marriage, a trust is created of community assets.

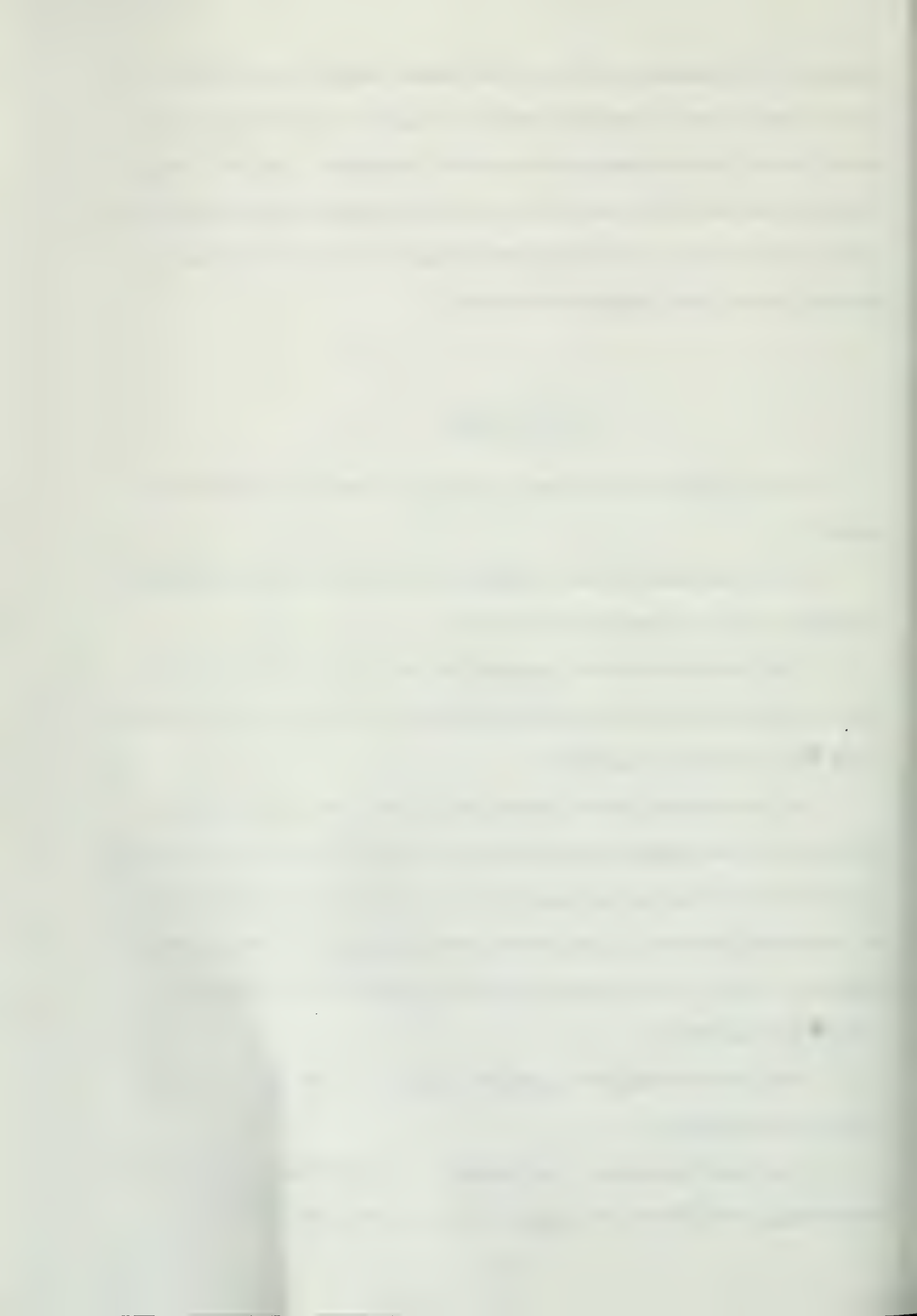
The Appellant signed approval of the trust and subsequently consented to two amendments thereto.

The Government now argues that the very basic spirit of community property law is obviated because of the necessary legal effect of Appellant's approval.

In her opening brief, Appellant argued that if a domestic problem had developed between Appellant and her deceased husband, any California court would have found that the trust agreement did not effectively destroy Appellant's vested interests in the community property. BUT, that is exactly what the position of the District Court accomplishes.

It is interesting that Appellee remains silent on this point in its opening brief.

Equitably speaking, this appeal concerns itself with whether Appellant is foreclosed from showing that there was no intent on



her part (or on her husband's part) to divest herself of her statutory right to one-half of the community.

To effectuate such a transfer should require the clearest possible manifestations of intent. The deposition shows no such intent. Appellant was asked on two occasions to consent to trust amendments after she had already approved the trust. The only reasonable explanation for this is that the parties felt that notwithstanding her prior approval it was necessary for Mrs. Katz to continue to assent to any subsequent alterations or amendments.

These facts not only negate Appellee's position but underline the error of the District Court of not granting Appellant's Motion for Summary Judgment.

Respectfully submitted,

NORTON A. KESTEN and

LEVINSON, MARCUS & BRATTER

By: BURTON S. LEVINSON

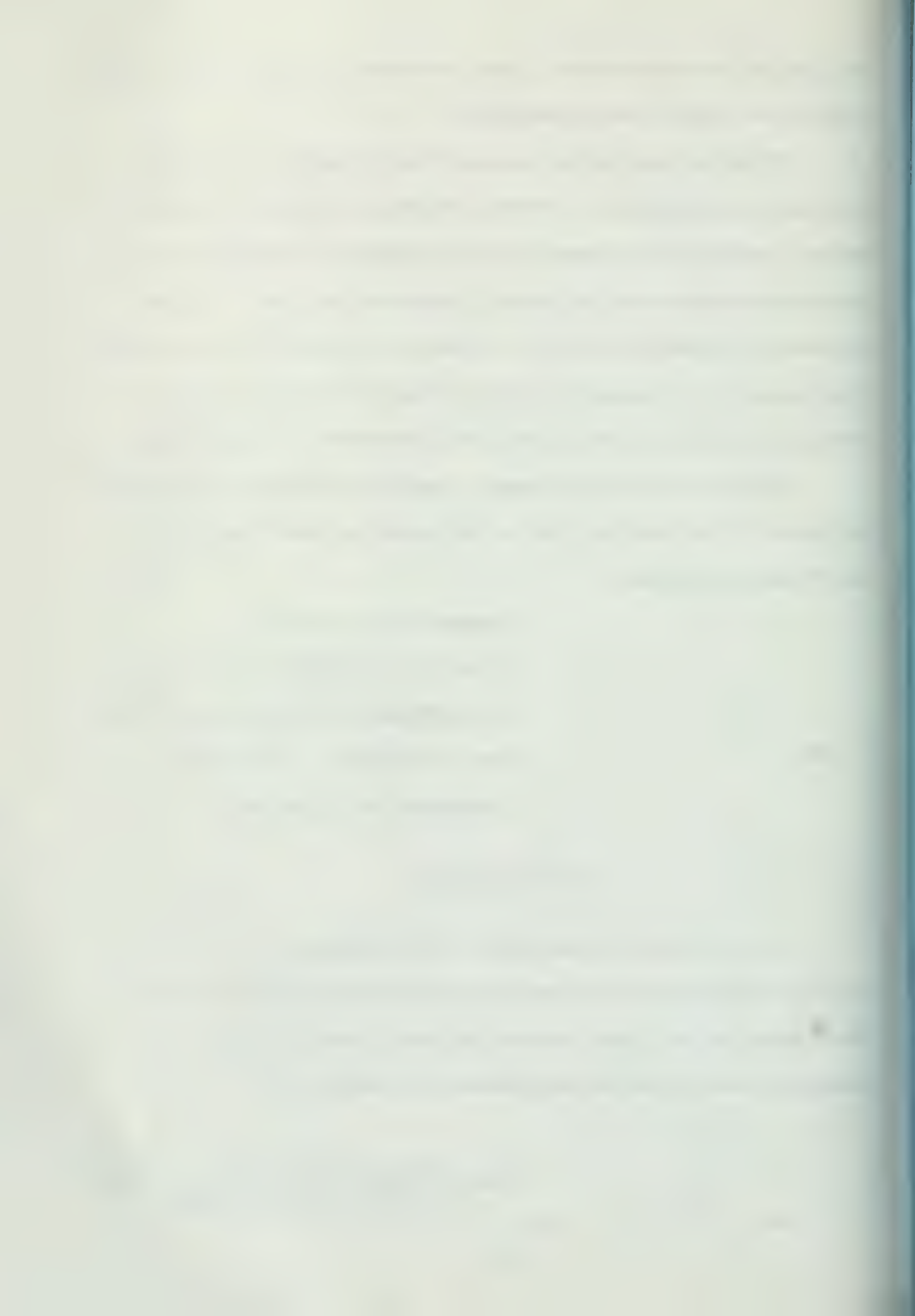
Attorneys for Appellant.

#### CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Burton S. Levinson  
BURTON S. LEVINSON













APPENDIX "A"

CALIFORNIA CIVIL CODE

§157. SEPARATE PROPERTY; DWELLING

Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling except that in actions or proceedings for divorce, annulment of marriage or separate maintenance, the court may make orders for temporary exclusion of either party from the family dwelling or from the dwelling of the other, until the final determination of the action.

§163. SEPARATE PROPERTY; HUSBAND

SEPARATE PROPERTY OF THE HUSBAND. All property owned by the husband, before marriage, and that acquired afterwards by gift, bequest, device or descent, with the rents, issues, and profits thereof, is his separate property.





No. 21,124 ✓

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

ROSA CONTINENTE, dba G. CONTINENTE,  
*Plaintiff and Appellant,*

VS.

JOHN A. CONTINENTE,  
*Defendant and Appellee.*

**PLAINTIFF AND APPELLANT'S OPENING BRIEF**

---

GARDNER & ZIMMERMAN,  
HARRIS ZIMMERMAN,  
1330 Broadway,  
Oakland, California 94612,  
*Attorneys for Plaintiff*  
*and Appellant.*

FILED

JAN 5 '87

WM. B. LUCK, CLERK



## Subject Index

---

	Page
Jurisdiction .....	1
Statement of the case .....	2
Specification of errors .....	3
Question on appeal .....	4
Argument .....	4
Summary of factual background .....	4
Plaintiff has the exclusive right to use the registered trademark "Continente" in commerce .....	8
Plaintiff is not required to establish a secondary meaning to her registered trademark .....	11
Defendant had both actual and constructive notice of plaintiff's trademark rights .....	14
There is no absolute right of a person to use his own name in business .....	15
Defendant had the burden of selecting a trademark dis- tinguishable from that of plaintiff and doubts must be resolved against it .....	17
This court on appeal can properly make its own deter- mination of the likelihood of confusion .....	18
There is a strong likelihood of confusion .....	19
Conclusion .....	21

---

## Table of Authorities Cited

---

Cases	Pages
Borg-Warner Corporation v. York-Shipley, Inc., 127 USPQ 42 (N.D. Ill. 1960) .....	10
Max Factor & Co. v. Factor, 226 F.Supp. 120 (S.D. Calif. 1963) .....	15
Fleischmann Distilling Corporation et al. v. Maier Brewing Company et al., 314 F.2d 149 (9th Cir. 1963) .....	18, 19
Richard Hudnut v. DuBarry of Hollywood, Inc., 127 USPQ 486 (S.D. Calif. 1960) .....	10

	Pages
Iowa Farmers Union et al. v. Farmers' Educational and Co-operative Union of America, 247 F.2d 809 (8th Cir. 1957)	13
S. C. Johnson & Son, Inc. v. Johnson, 116 F.2d 427 (2nd Cir. 1940) .....	15
Kelly Girl Service, Inc. v. Roberts, 243 F.Supp. 225 (E.D. La. 1965) .....	17
La Maur, Inc. v. Revlon, Inc., 249 F.Supp. 839 (Minn. 1965) .....	17
G & C Merriam Co. v. Saalfeld, 198 Fed. 369 (6th Cir. 1912) .....	11
Pacific Supply Cooperative v. Farmers Union Central Exch., Inc., 318 F.2d 894 (9th Cir. 1963) .....	10
John R. Thompson Co. et al. v. Holloway et al., 366 F.2d 108 (5th Cir. 1966) .....	12, 15

### Statutes

Lanham Act (U. S. Code, Title 15, Section 1115(b)) .....	8
Trademark Act of 1946 (U. S. Code, Title 15, Chapter 22)	14
U. S. Code, Title 15, Section 1065 .....	4, 8, 9
U. S. Code, Title 15, Section 1052(e) .....	12
U. S. Code, Title 15, Section 1052(f) .....	12
U. S. Code, Title 15, Section 1072 .....	14
U. S. Code, Title 15, Section 1114(1) .....	20
U. S. Code, Title 15, Section 1114(1) (a) .....	18
U. S. Code, Title 15, Section 1115(a) .....	14
U. S. Code, Title 15, Sections 1115(b) (1) to 1115(b) (7) ..	9
U. S. Code, Title 15, Section 1115(b) (4) .....	9
U. S. Code, Title 28, Section 1291 .....	2
U. S. Code, Title 28, Section 1338(a) .....	1
U. S. Code, Title 28, Section 1338(b) .....	1
U. S. Code, Title 28, Section 2107 .....	2

### Texts

3 Callmann Unfair Competition and Trade-Marks (2nd Edition) :	
Page 1224 .....	11
Page 1680 .....	15
Pages 1686 and 1687 .....	16

No. 21,124

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

ROSA CONTINENTE, dba G. CONTINENTE,  
*Plaintiff and Appellant,*

VS.

JOHN A. CONTINENTE,  
*Defendant and Appellee.*

**PLAINTIFF AND APPELLANT'S OPENING BRIEF**

---

Plaintiff-appellant files this opening brief in support of her appeal from a judgment entered by the District Court denying plaintiff's request to enjoin defendant-appellee from using the designation "JOHN A. CONTINENTE" as a trademark for juice grapes.

---

**JURISDICTION**

Jurisdiction of the District Court was based on U. S. Code, Title 28, Section 1338(a) and Section 1338(b), the first cause of action being based upon the trademark laws of the United States (R. 1, Para. 1; R. 14FF, Para. 1), and the second cause of action stating a related claim for unfair competition (R. 3, Para. 7).



Jurisdiction of this Court is based upon U. S. Code, Title 28, Section 1291, this appeal being taken from a final decision of a District Court of the United States (R. 101). The judgment was entered on May 6, 1966 (R. 101), and the notice of appeal was filed on June 2, 1966 (R. 104), within the 30 day period provided by U. S. Code, Title 28, Section 2107.

---

### **STATEMENT OF THE CASE**

This suit is one for infringement of plaintiff's trademark "CONTINENTE" for grapes, which was registered on the principal register in the U. S. Patent Office on June 15, 1954 under No. 591,366 (plaintiff's exhibits 1, 3). Plaintiff submits that the use of defendant's own name "JOHN A. CONTINENTE" as a trademark for grapes constitutes an infringement of such registration (R. 14GG).

Defendant contended in the Court below that said registration is invalid, and that he has a right to use his own name on and in connection with the marketing of grapes (R. 14GG).

The District Court, after trial without a jury, found that plaintiff and her deceased husband had used the mark "CONTINENTE" since 1937 for grapes (R. 94, 95); that plaintiff is the owner of U. S. Patent Office Registration 591,366 of June 15, 1954, for "CONTINENTE" (R. 96); that said Registration is valid (R. 99); but that plaintiff did not establish any secondary meaning in her mark (R. 95); and that

defendant's request for its cancellation was denied (R. 101).

The District Court further found that defendant commenced marketing grapes under his own name in 1962 (R. 97); that the concurrent use of "CONTINENTE" and "JOHN A. CONTINENTE" as trademarks for grapes was not likely to lead to confusion or mistake (R. 98); that defendant had the right to use his name "JOHN A. CONTINENTE" in lettering of the same size and form as a trademark in connection with the marketing of grapes (R. 99); and denied plaintiff's request for an injunction (R. 101).

On May 6, 1966, after Judgment was entered denying plaintiff's request for injunction (R. 101), this appeal followed (R. 104).

---

#### **SPECIFICATION OF ERRORS**

1. The District Court erred in denying plaintiff's request for an injunction and in dismissing the Complaint (R. 99, 101).

2. The District Court erred in its finding that "defendant's use of JOHN A. CONTINENTE as a trademark for juice grapes is not likely to lead to mistake or confusion with plaintiff's use of CONTINENTE as a trademark for juice grapes" (R. 98).

3. The District Court erred in failing to apply the proper legal standard as to the statutory effect of plaintiff's registration, and instead adopting an un-

necessary and unsupported finding that plaintiff did not establish a secondary meaning to the mark CONTINENTE as applied to grapes.

---

### QUESTION ON APPEAL

The real issue to be determined by this Court on appeal is whether defendant has the right to use his own name, to wit, "JOHN A. CONTINENTE", as a trademark, for grapes in view of plaintiff's prior use and registration of "CONTINENTE" as a trademark for grapes, particularly where

1. plaintiff's registration of "CONTINENTE" has become incontestable under U. S. Code, Title 15, Section 1065;
2. defendant's use commenced about 25 years after plaintiff's first use and 8 years after plaintiff's registration issued;
3. both plaintiff and defendant have their places of business in the same city; and
4. the surname is not a common one, nor has it been used by others.

---

### ARGUMENT

#### SUMMARY OF FACTUAL BACKGROUND

At the trial, it was made clear that plaintiff and her deceased husband used "CONTINENTE" as a trademark for grapes for a period of many years. The witness Napolitano had worked for plaintiff since

1948, and has been manager of the business since 1952, when plaintiff's husband became incapacitated and subsequently died (Tr. 16, 78).

The "CONTINENTE" brand paper label (plaintiff's exhibit 5) has been used for grapes at least as early as 1948 (Tr. 18), and the so-called side inserts, i.e., the imprinting of the "CONTINENTE" mark directly into the wood of the side panels of the lug boxes as shown in plaintiff's exhibits 7 and 8, has been used on all grape boxes since 1952 or 1953 (Tr. 22), even when a "LUGANO" brand paper label was used on an end of the box as in plaintiff's exhibit 8 (Tr. 23).

The witness Bianco also testified seeing lug boxes as shown in plaintiff's exhibit 7 in 1941 or 1942, and continuously thereafter (Tr. 50). The defendant himself acknowledged his familiarity with plaintiff's use of "CONTINENTE" as a trademark for grapes in the 1930's or early 1940's (Tr. 138).

The books and records of plaintiff in charge of Mr. Napolitano (Tr. 24) show a "CONTINENTE" grape sale as early as 1939 (plaintiff's exhibit 11, Tr. 26), and continued "CONTINENTE" grape sales in 1944 (plaintiff's exhibit 14, Tr. 27, 28), in 1945 (plaintiff's exhibit 16, Tr. 29), in 1954 (plaintiff's exhibit 20, Tr. 31), in 1955 (plaintiff's exhibit 21, Tr. 31), in 1957 (plaintiff's exhibit 22, Tr. 32), in 1962 (plaintiff's exhibit 23, Tr. 32), etc. These auction reports of sales were merely representative of other sales (Tr. 37) as were plaintiff's exhibits 12, 17, 19, etc., evidencing lug box purchases (Tr. 37, 38).



Plaintiff's exhibit 32, of a sales summary, shows some \$6,000,000.00 in grape sales for both "LUGANO" and "CONTINENTE" brand grapes. Even where "LUGANO" boxes were used, the designation "CONTINENTE" always appeared (Tr. 40), and for the period 1952-1962, irrespective of the paper label used, "CONTINENTE" appeared on the side insert as shown in plaintiff's exhibits 7 and 8 (Tr. 39).

It was also established without denial, that the word "CONTINENTE" had not been used by any person other than plaintiff as a trademark for grapes, until the defendant's use thereof (Tr. 75, 49, 50); such latter use first occurring in 1962 (Tr. 118), over 20 years after plaintiff's first use, and 8 years after plaintiff's registration (plaintiff's exhibits 1, 3).

Through the witness Bianco, a person thoroughly familiar with marks and labels used by grape growers (Tr. 48, 56-58), it was established that surnames are frequently used as trademarks for grapes (Tr. 47, 48), and that in no other instance has a surname been used by one party and the same surname and a given name used by another (Tr. 49, 50). He testified as to the high quality of plaintiff's "CONTINENTE" grapes (Tr. 51) and that such grapes were asked for by name (Tr. 51). He significantly also gave his opinion regarding likelihood of confusion in the following manner (Tr. 51, 52):

"Q. Now, with your background in the grape industry, both as a grower, shipper and as a broker or commission merchant, in your opinion, if one shipper could use a surname as a trade-

name for his grapes, and another shipper could use a surname plus a given name, do you think there is any likelihood of confusion?

A. Yes."

The defendant's own testimony revealed many interesting facets of the present controversy. Although the defendant had been selling his grapes to his uncle and to his aunt, plaintiff herein, since 1943 (Tr. 117) and as late as 1959 (Tr. 118), and although he knew of the use of the "CONTINENTE" mark by plaintiff, the following testimony of defendant on cross-examination is significant (Tr. 143):

"Q. At the time you told the Schmidt people to go ahead with Exhibit 34, you were, of course, as you testified, familiar with the fact that your uncle and aunt had used the term 'CONTINENTE GRAPES'; did you think that there might be any confusion resulting from your use of 'CONTINENTE GRAPES' and their use of it?

A. No, I didn't.

Q. You thought it would be all right for two different people to use the identical brand name?

A. Yes."

However, upon continued cross-examination, the defendant testified as follows (Tr. 159):

"Q. Tell me, do you think if the G. Continente firm puts out a very inferior grape this next year that it might affect you in future years?

A. Not if they don't go to the same market I am going to.

Q. What if they do go to the same market?

A. Then, yes, they would hurt.



Q. Would the reverse be true if you put out an inferior grape under JOHN A. CONTINENTE, do you think it might injure the G. Contiente Company in connection with their sales?

A. If they came to the same market, if it went to the same place, it would."

It may also be pointed out that even where defendant used his full name "JOHN A. CONTINENTE" as a trademark, an inspector shortened the name to "J. CONTINENTE" (Tr. 160).

Aside from the defendant's obviously naive or false understanding of business practices that the use of *identical* brand names would not result in confusion (Tr. 143), the defendant failed to produce any evidence of any kind that would show a lack of likelihood of confusion, and no other proper legal defense for his action in first adopting the identical mark previously registered by plaintiff, and then merely modifying it by adding "JOHN A." to the mark.

---

**PLAINTIFF HAS THE EXCLUSIVE RIGHT TO USE THE REGISTERED TRADEMARK "CONTINENTE" IN COMMERCE**

Under the Lanham Act, U. S. Code, Title 15, Section 1115(b), once the right to use a registered mark has become incontestable pursuant to U. S. Code, Title 15, Section 1065, "... the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce . . .", subject to certain enumerated defenses.

The incontestable nature of plaintiff's registration, by compliance with U. S. Code, Title 15, Section 1065, is established through the filing of the necessary affidavits by plaintiff (plaintiff's exhibit 4). Thus, plaintiff's Registration No. 591,366 of June 15, 1954 (plaintiff's exhibit 1), as amended (plaintiff's exhibit 3), is conclusive evidence of plaintiff's exclusive right to use the registered mark "CONTINENTE" on the goods specified, i.e., juice grapes.

Although certain defenses are available under U. S. Code, Title 15, Sections 1115(b)(1) to 1115(b)(7), and defendant raised the issue of the validity of plaintiff's registration (R. 14GG), the District Court in its findings, held Registration 591,366 to be valid (R. 99), and in its judgment, denied defendant's request for cancellation thereof (R. 101). No appeal was taken by defendant on this portion of the judgment, and therefore, plaintiff is entitled to the benefits of U. S. Code, Title 15, Section 1115(b) as to the conclusive nature of her exclusive right to use the mark "CONTINENTE" in commerce in connection with the marketing of juice grapes.

The incontestable rights obtainable under the Lanham Act do not treat a surname type of trademark any differently from any other type of trademark, nor otherwise diminish the benefits available to the registrant. In fact, the Act clearly recognizes that the registered mark can constitute a surname, since one defense available to a defendant under U. S. Code, Title 15, Section 1115(b)(4) is that the use of the name charged to be an infringement is a use of the

defendant's individual name ". . . otherwise than as a trade or service mark . . .". In the present case, it is the defendant's use of his name *as a trademark* of which complaint is made, so no such defense is available to him, nor in this appeal may any other defense be properly raised.

This Court, in *Pacific Supply Cooperative v. Farmers Union Central Exch., Inc.*, 318 F.2d 894 (9th Cir. 1963), recognized the creation of substantive rights in registrations procured under the Lanham Act, including constructive notice of the registrant's claim of ownership, prima facie evidence of ownership, prima facie evidence of the validity of the registration and of the registrant's exclusive right to use, as well as the incontestable features available after any five years' use.

In *Borg-Warner Corporation v. York-Shipley, Inc.*, 127 USPQ 42 (not otherwise reported), (N.D. Ill. 1960), involving defendant's registrations of the surname "YORK", the Court stated at page 45:

"... defendant's registrations No. 520,615 has become incontestable and affords defendant a conclusive presumption of the exclusive right to use said registered trademark respecting furnace and heating products."

The above case was cited with approval in *Richard Hudnut v. DuBarry of Hollywood, Inc.*, 127 USPQ 486 (not otherwise reported), (S.D. Calif. 1960) wherein the incontestable registration of "DUBARRY" afforded plaintiff a conclusive presumption of exclusive right thereto.

With plaintiff's rights in the mark "CONTINENTE" thus established, defendant entering the picture years subsequent to plaintiff's registration, has no basis for asserting that by his own use, he wants to restrict plaintiff's rights to a non-exclusive use, instead of the exclusive use provided by statute.

---

**PLAINTIFF IS NOT REQUIRED TO ESTABLISH A SECONDARY MEANING TO HER REGISTERED TRADEMARK**

The District Court in its findings held that plaintiff failed to establish that "CONTINENTE" had acquired a secondary meaning (R. 95), and accordingly denied plaintiff's request for relief. This finding was contrary to the testimony of Mr. Bianco who testified regarding "CONTINENTE" and other surnames used as trademarks in the grape industry. However, it is submitted that irrespective of the trial testimony, the secondary meaning theory has no application to situations involving a federally registered mark, particularly where the registration has become incontestable, as in the case at bar. As well explained in *Callmann Unfair Competition and Trade-Marks*, 2nd Edition, Volume 3, at page 1224, citing from *G & C Merriam Co. v. Saalfeld*, 198 Fed. 369, 373 (6th Cir. 1912):

"Hence came the 'secondary meaning theory' which 'contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise, descriptive, might nevertheless have been used so long and so exclusively by one pro-



ducer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark.' ”

Irrespective of what is required to establish a “secondary meaning” for a trade name or for a common law trademark, and even though U. S. Code, Title 15, Section 1052(e) normally prevents registration of a mark which is primarily merely a surname; Section 1052(f) provides that notwithstanding the normal prohibition of registration of surnames, the same may be registered on the principal register where the Commissioner is satisfied that the mark has become distinctive, and accept as prima facie evidence of such distinctiveness, the substantially exclusive and continuous use thereof by the applicant in commerce for the five year period prior to the filing of the application for registration.

Pursuant to this so-called 2(f) provision for registration of surnames, plaintiff’s registration was applied for on October 13, 1953, some sixteen years after its first use (plaintiff’s exhibit 4), and her registration was duly issued (plaintiff’s exhibits 1, 3).

Accordingly, after the Patent Office registered the trademark “CONTINENTE”, and the registration became incontestable, any question as to whether the mark, which is a surname, should have been refused registration for a lack of showing of secondary meaning, is no longer open. *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108 (5th Cir. 1966).

As stated in *Iowa Farmers Union et al. v. Farmers' Educational and Cooperative Union of America*, 247 F.2d 809 (8th Cir. 1957) at page 818:

“In addition to the foregoing, Subsection (b) of Section 1057, Title 15 U.S.C.A., places the burden on the defendants to overcome the presumption arising from the registration of plaintiff's marks in the Principal Register of the Patent Office. This presumption includes the following: (1) the dissimilarity of plaintiff's marks to other registered marks for similar goods or services (2) the secondary meaning of plaintiff's marks (3) the ownership of the marks by plaintiff, and (4) plaintiff's exclusive right to use said marks in commerce in connection with the goods and services specified by the plaintiff in such registration.”

In the case at bar, there was no duty of plaintiff to establish a “secondary meaning” to her mark, since plaintiff was entitled to rely on her incontestable registration and its conclusive establishment of validity—including the secondary meaning of the mark.

If a plaintiff is required to establish a secondary meaning for a trademark registered under the federal registration statutes, the provisions of the statute would have no meaning. Proof of secondary meaning is normally required to create a technical trademark—one capable of registration—out of an otherwise unregistrable mark. Here, the registration per se voices the fact that a technical trademark exists, and a secondary meaning, if one is required, exists in fact.



**DEFENDANT HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE  
OF PLAINTIFF'S TRADEMARK RIGHTS**

Plaintiff's mark is registered on the principal register of the Trademark Act of 1946 ((U. S. Code, Title 15, Chapter 22) (plaintiff's exhibits 1, 3).

Defendant had actual knowledge of plaintiff's use of "CONTINENTE" as a trademark for juice grapes (Tr. 138), and the District Court's findings as to the good faith of the defendant (R. 98, 99) are open to question, particularly where defendant's first printed labels (plaintiff's exhibit 34) constituted the word "CONTINENTE" alone as his trademark (Tr. 143), the identical word used and registered by plaintiff.

Irrespective, however, of defendant's good faith or lack thereof, or any steps taken by him to avoid deception, under U. S. Code, Title 15, Section 1072, registration of a mark on the principal register constitutes constructive notice of the registrant's claim of ownership, and under U. S. Code, Title 15, Section 1115(a), such registration constitutes prima facie evidence of the registrant's exclusive right to use the registered mark in commerce on the goods specified in the registration.

**THERE IS NO ABSOLUTE RIGHT OF A PERSON  
TO USE HIS OWN NAME IN BUSINESS**

Defendant urged that because his name is in fact "John A. Continente", that he had the right to use the same, and the Court below so held (R. 99).

While lip service is still occasionally applied to the old doctrine that every man has a right to use of his own name, the law is now clear that no man may use his own name in such manner as to injure another unfairly or fraudulently in his business. In this circuit and elsewhere, the Courts have not hesitated in granting injunctive relief against continued use of one's own name, where such use created confusion, or was likely to lead to confusion. *Max Factor & Co. v. Factor*, 226 F.Supp. 120 (S.D. Calif. 1963); *S. C. Johnson & Son., Inc. v. Johnson*, 116 F.2d 427 (2nd Cir. 1940). In *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108 (5th Cir. 1966), the Court, citing extensive authority, stated at page 113:

"However, we do agree with the plaintiff that a man has no *absolute* right to use his own name, even honestly, as the name of his merchandise or his business. As such it becomes a trade name or service mark subject to the rule of priority to prevent deception of the public."

In the authoritative work of *Callmann Unfair Competition and Trade-Marks*, 2nd Edition, Volume 3, at page 1680, it is stated:

"Recent cases, however, happily indicate a greater sensitivity to the problem. Thus it has been said that: 'One must use his own name

honestly and not as a means of pirating the good will and reputation of business rivals; *and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business.'*"

Continuing the discussion on pages 1686 and 1687 as to relief granted to a plaintiff against the defendant's use of his own name, the author writes:

"The basic question is whether the plaintiff's trademark is infringed by the similarity of the defendant's name.

"Where the defendant asserts his 'sacred right' to do business under his own name the question arises whether this right should be limited to the use of his name in or as a firm name or whether it includes the use of the name as a trademark, even though the name is not used in the firm name. It is suggested that this right be limited to the first usage."

In the case at bar, there was little, if any, commercial necessity established for defendant to use his name as a firm name, but absolutely no such necessity for him to use his name as a trademark. The defendant may continue to use his own name to his heart's content, but should not be permitted to use it to either injure the plaintiff or to deceive or confuse the public.

**DEFENDANT HAD THE BURDEN OF SELECTING A TRADE-MARK DISTINGUISHABLE FROM THAT OF PLAINTIFF AND DOUBTS MUST BE RESOLVED AGAINST IT**

The basic proposition is well established in law, as well as by common business ethics, that one entering a field of endeavor already occupied by another has a duty to select a mark which is sufficiently distinguishable from the registered mark of a prior user as to avoid confusion. It is also fundamental, as stated in *Kelly Girl Service, Inc. v. Roberts*, 243 F. Supp. 225 (E. D. La. 1965); page 228:

“The burden is on the defendant to avoid confusion, mistake or deception and if doubt exists, it must be resolved against her as the latecomer.”  
(citing case)

Similarly, in *La Maur, Inc. v. Revlon, Inc.*, 249 F. Supp. 839 (Minn. 1965), it was said at page 845:

“Moreover, Revlon, as the latecomer, should have all doubts resolved against it.”

Defendant failed to establish any valid business purpose in adopting a trademark which included plaintiff's entire registered mark, and allegedly had plaintiff's exhibit 34 printed at the suggestion of the label company (Tr. 121). In 1963, defendant also used a different trademark, i.e. “GIOVANNI'S” (Tr. 148), clearly illustrating no absolute requirement for him to adopt and use a mark containing plaintiff's registered word “CONTINENTE”. The small duty which the law imposes on the junior use to avoid confusion is one which the defendant can and should be required to assume herein.

**THIS COURT ON APPEAL CAN PROPERLY MAKE ITS OWN  
DETERMINATION OF THE LIKELIHOOD OF CONFUSION**

Where a defendant uses a mark which is a counterfeit, copy or colorable imitation of plaintiff's registered mark ". . . where such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services . . .", the defendant's liability is established under U. S. Code, Title 15, Section 1114(1)(a).

In its Findings of Fact (R. 94), and more particularly, Finding 26 (R. 98), the District Court found that defendant's use of "JOHN A. CONTINENTE" as a trademark for juice grapes was not likely to lead to mistake or confusion with plaintiff's use of "CONTINENTE" as a trademark for juice grapes.

Notwithstanding such a finding, the likelihood of confusion determination is one for this Court of Appeals to decide.

In *The Fleischmann Distilling Corporation et al. v. Maier Brewing Company et al.*, 314 F.2d 149 (9th Cir. 1963), at page 152, this Court said:

"Numerous cases in this and other circuits hold that under the circumstances here present, the question of the likelihood of confusion is one for us to decide. In *Sleeper Lounge Company v. Bell Manufacturing Co.*, 9 Cir., 253 F.2d 720, 723, this Court quoted with approval the quotation in *Miles Shoes, Inc. v. R. H. Macy & Co.*, 2 Cir., 199 F.2d 602, that 'we are in as good a position as the trial judge to determine the probability of confusion.'



“One reason for applying the rule of that case and of the other cases in accord cited in the margin is that this determination of likelihood of confusion partakes more of the character of a conclusion of law than of a finding of fact.”

In *Fleischmann*, supra, this Court, in holding the lower Court erred in denying the injunction prayed for, then stated at page 161:

“It is the general public, the unskilled purchaser, who is entitled to protection; and in determining whether there is a likelihood of confusion we must remember that the members of the purchasing public have only general impressions which must guide them in the selection of products. We think that the purchaser of a carton of beer in Ralphs’ grocery store would have no way of pulling from his pocket a precise copy of Buchanan’s label to compare with the label on the beer. His general impression relates to the name ‘Black & White’ and that is the extent of his knowledge ordinarily.”

---

#### **THERE IS A STRONG LIKELIHOOD OF CONFUSION**

It is difficult to perceive of a factual situation wherein the likelihood of confusion is clearer. First, the goods of plaintiff and defendant are identical, each growing and marketing juice grapes. Second, both grow and ship their grapes from the same location, and plaintiff’s labels (plaintiff’s exhibits 5, 7) and defendant’s labels (plaintiff’s exhibits 34, 35, 36) all show the origin of both party’s grapes to be in



Oakley, California. Next, a mere comparison of the marks themselves, i.e., "CONTINENTE" and "JOHN A. CONTINENTE" graphically illustrates their similarity. Also, it is clear that even though defendant may now use his full name as his trademark, there is a tendency for persons to abbreviate, and his grapes are likely to be referred to as "CONTINENTE" grapes; just as an inspector designated the defendant's grapes as "J. CONTINENTE" (Tr. 160). Further, although "CONTINENTE" is a surname, it is not a common type of surname like "SMITH", "JOHNSON" or "ROGERS". Finally, it is significant that no party other than plaintiff used any mark including "CONTINENTE" until defendant's subsequent use.

The defendant's acts are likely to cause confusion or mistake or to deceive purchasers as to the source of his grapes within the clear prohibition of U. S. Code, Title 15, Section 1114(1).

### CONCLUSION

For the reasons stated above, plaintiff urges that the judgment of the District Court be reversed and that this cause be remanded with instructions to issue an injunction enjoining the defendant from using the trademark "JOHN A. CONTINENTE" or any other colorable imitation of "CONTINENTE" in connection with the marketing and commerce in juice grapes.

Dated, Oakland, California,  
January 3, 1967.

Respectfully submitted,  
GARDNER & ZIMMERMAN,  
HARRIS ZIMMERMAN,  
*Attorneys for Plaintiff  
and Appellant.*

---

### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS ZIMMERMAN,  
*Attorney for Plaintiff  
and Appellant.*

**(Appendix Follows)**



## **Appendix**



## Appendix

### LIST OF EXHIBITS

Exhibit No.	Description	Identified	Received
<b>By Plaintiffs</b>			
1	Certified copy Reg. 591,366	4	60
2	Certified copy Title Abstract of Reg. 591,366	4	60
3	Certified copy Amended Reg. 591,366	4	60
4	Certified copy file history Reg. No. 591,366	4	60
5	"CONTINENTE" brand grape paper label	18	60
6	"CONTINENTE" brand apricot paper label	18	60
7	"CONTINENTE" grape box with "CONTINENTE" side inserts	22	60
8	"LUGANO" grape box with "CONTINENTE" side inserts	23	60
9	Carton Label Corporation— acknowledgment of July 25, 1939 of order for 9000 "CONTINENTE" labels	25	60
10	Letter of September, 1939, D. L. Scotto, to G. Continente	25	60
11	September 28, 1939 Auction Report for "CONTINENTE" grapes	25	60
12	Dwight Lumber confirmation of order of May 18, 1944 for G. Continente apricot boxes	26	60
13	Big Lakes Box Co. manifest of May 27, 1944 Continente Apricot lug boxes	27	60



Exhibit No.	Description	Identified	Received
14	September 22, 1944 Auction Report for "CONTINENTE" and "LUGANO" grapes	27	60
15	Dwight Lumber confirmation of order of May 1, 1945 for Continente & Lugano boxes	28	60
16	October 5, 1945 Auction Report	28	60
17	Dwight Lumber invoice May 2, 1946 for "CONTINENTE" boxes	29	60
18	Loss & Damage report July 16, 1946 "CONTINENTE" brand	29	60
19	Stockton Box Invoice October 2, 1950 "CONTINENTE" side inserts	30	60
20	October 14, 1954 Auction Report	30	60
21	October 28, 1955 Auction Report	31	60
22	October 22, 1957 Auction Report	31	60
23	October 18, 1962 Auction Report	32	60
24	Letter of April 14, 1963 Swartz Bros. Ltd. to Joe Phillips, Inc.	32	60
25	Letter of September 9, 1963 Joe Phillips, Inc. to Mrs. G. Continente	33	60
26	Letter of May 14, 1964, Setrabian Co. to Mrs. Continente	34	60
27	Letter of May 20, 1964, Setrabian to Napolitano	35	60
28	1964 Contra Costa telephone directory page 260	35	60
29	1964 Contra Costa telephone directory page 231	35	60
30	G. Continente letterhead	36	60
31	Articles from Contra Costa Gazette May 29, 1959	36	60

Exhibit No.	Description	Identified	Received
32	Schedule "CONTINENTE" grape sales	38	64
33	Schedule Lugano box purchases	39	60
34	Defendant's lug box end wall with paper label of "CONTINENTE"	65	68
35	Defendant's paper label with "JOHN A." rubber stamped over "CONTINENTE"	70	150
36	Defendant's end panel with "JOHN A. CONTINENTE"	71	72
37	Defendant's end panel "CONTINENTE"	72	73
38	Defendant's end panel "GIOVANNI'S"	73	74
39	Letter September 10, 1962 to John A. Continente from Gardner & Zimmerman	143	144

Exhibit No.	Description	Identified	Received
<b>By Defendant</b>			
A	Deposition of Rosa Continente	87	87
B	Interrogatories Propounded to Rosa Continente	87	
C	Order & Receipt for Labels, August 23, 1962	124	124
D	Sale, etc. Documents 1962	125	126
E	Sale, etc. Documents 1962	126	
F	1963 records, sales, etc.	127	129
G	Proof of label JOHN A. CONTINENTE	129	130
H	Batch of Documents 1964 sales	131	134
I	Batch of Documents—order for "JOHN A." rubber stamp	135	135



No. 21,124

United States Court of Appeals  
For the Ninth Circuit

---

ROSA CONTINENTE, dba G. CONTINENTE,  vs. JOHN A. CONTINENTE,  	<i>Plaintiff-Appellant,</i>    <i>Defendant-Appellee.</i>
--	---

BRIEF ON BEHALF OF DEFENDANT-APPELLEE

---

WILLIAM G. MACKAY,  
155 Montgomery Street,  
San Francisco, California 94104,  
*Attorney for Defendant-Appellee.*

FILED

FEB 1 1967

WM. B. LUCK, CLERK



## Subject Index

---

	Page
Statement of the case .....	1
The facts .....	3
Effect of registration claimed by appellant .....	7
It is fundamental any rights in a family name are limited in fact and in law .....	12
There is no likelihood of confusion .....	16
Conclusion .....	19

---

## Table of Authorities Cited

---

Cases	Pages
American Foods, Inc. v. Golden Flake, Inc., 312 F.2d 619, 136 USPQ 286 (5 Cir. 1960) .....	17
Blanchard & Co., Inc. et al. v. Charles Gilman & Son, Inc., 145 USPQ 62 (DC Mass. 1965) .....	9
Chappell v. Goltsman, 197 F.2d 837, 94 USPQ 40 (5 Cir. 1952) .....	17
Crane Co. v. Crane Heating & Air Conditioning Co. et al., 132 USPQ 478 (CA 6 1962) .....	15
Dant Distillery Co., John P. v. Schenley Distillers, Inc., 128 USPQ 456 (DC WDKy. 1960) .....	14, 15
Dawn Donut Company, Inc. v. Hart's Food Stores, et al., 267 F.2d 358, 121 USPQ 430 (CA 2 1959) .....	10
Donnell, James W. v. Herring-Hall-Marvin Safe Co. et al., 208 U.S. 267, 52 L. Ed. 481 (1907) .....	16
D & W Food Corp. et al. v. Graham, 286 P.2d 55, 107 USPQ 24 (Calif. DistCtApp. 1955) .....	13



	Pages
Fleetwood Company, The v. Hazel Bishop, Inc., 352 F.2d 841, 147 USPQ 344 (CA 7 1965) .....	18
Fleischmann Distilling Corporation et al. v. Maier Brewing Company et al., 314 F.2d 149, 136 USPQ 508 (CA 9 1963) .....	12, 13
Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 25 Sup. Ct. Rep. 609 (1905), 49 L. Ed. 972 .....	15
Lerner Stores Corporation v. Lerner, 162 F.2d 163, 73 USPQ 524 (CA 9 1947) .....	17
Plough, Inc. v. Kreis Laboratories et al., 314 F.2d 635, 136 USPQ 560 (CA 9 1963) .....	17
Reese Chemical Co., The v. Lisner, 87 USPQ 121 (1950) ...	8
Squirrel Brand Company v. Barnard Nut Co., Inc., 224 F.2d 840, 106 USPQ 296 (5 Cir. 1955) .....	17
Thompson Co. et al., John R. v. Holloway et al., 366 F.2d 108, 150 USPQ 728 (CA 5 1966) .....	16
Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association, 345 F.2d 158, 145 USPQ 244 (CA 9 1965) .....	11

### Statutes and Rules

15 U.S.C. 1052, Section 2(f) .....	7, 9
15 U.S.C. 1065(2), Section 15 .....	8
Lanham Act, 15 U.S.C. 1114 .....	3
Rule 52(a) F.R.C.P. ....	17

### Text

Nims, Unfair Competition and Trade-Marks, 4th Edition (1947) .....	13
--	----

No. 21,124

**United States Court of Appeals  
For the Ninth Circuit**

---

ROSA CONTINENTE, dba G. CONTINENTE, <i>Plaintiff-Appellant,</i>	}
vs.	
JOHN A. CONTINENTE, <i>Defendant-Appellee.</i>	

---

**BRIEF ON BEHALF OF DEFENDANT-APPELLEE**

---

In order that there be a just and final disposition of the issues in this proceeding, and in view of the importance of the matter to the Defendant-Appellee, it is deemed necessary to make a full reply to the brief of the Plaintiff-Appellant. It is submitted at the outset that the argument presented on behalf of the Plaintiff-Appellant is not in accordance with the facts or the law.

---

**STATEMENT OF THE CASE**

The action here was brought for alleged trademark infringement and unfair competition and each and every material allegation was denied. The primary

issue with which we are concerned is the right of the Appellee to use his own name, John A. Continente, in the marketing of fresh grapes.

Following a full trial on the merits, the District Court held (R. 82-87):

1. That everything the Appellee had done was calculated to distinguish his grapes from those of the Appellant and to avoid unfairly competing in the same markets.

2. That the Appellee took every reasonable step to guard against creating confusion or deception and at no time did he imitate or copy the style or script of the Appellant.

3. That the Appellant has used a particular ensemble showing Continente with a pictorial representation of a small girl primarily in connection with sales through wholesale markets in New York.

4. That in an earlier appraisal of the propriety of using John A. Continente, Judge Stanley A. Weigel approved the use of John A. Continente in the same size of block type in denying an application for a preliminary injunction.

5. That regardless of irregularities the U.S. registration 591,366 for Continente Brand should not be cancelled for fraud in the procurement of the registration.

6. That the Appellant failed to present testimony to support the contention that the "Continente" name had acquired a secondary meaning.

7. That the weight of authority indicates that the proper role of the Court is to correct any abuse of the important right to use a personal name rather than to determine that right.

8. That the Appellee did not adopt and is not using his own personal name for the purpose of impressing the public that the grapes originate with the Giovanni Continente family.

9. That considering the narrow and highly specialized markets in which sales are made by the Appellant and the Appellee, there is no likelihood of confusion or mistake under the Requirements of the Lanham Act (15 U.S.C. 1114).

The Appellee maintains that the action of the District Court, on the basis of the testimony and evidence, was entirely correct and proper and that the specification of errors relied upon by the Appellant is without merit.

---

### **THE FACTS**

The factual situation in this case is somewhat unusual. This is clearly and plainly not one of the ordinary run of cases in which someone has endeavored without justification to ride the coat-tails of a widely known and extensively advertised family name brand. In this proceeding the facts present a distinctly different picture.

We see that the Appellee, John A. Continente, is now engaged in the business of growing and marketing

fresh fruits and nuts, having ranches at Oakley and Brentwood (TR. 115-117) and has lived in Oakley all of his life. He is the son of Andrea Contiente, who was also known as Andrew Contiente, and he is the brother of Anthony Contiente and Vincent Contiente. His father worked with the Appellee's uncle, Giovanni Contiente, also known as G. Contiente, from 1920 until his death in 1943. Upon the death of his father, the Appellee acquired ranch property and commenced the marketing of grapes. It is clear that the uncle, Giovanni Contiente, was the business head of the entire family and occupied a patriarchal position according to a recognized old world pattern and that the members of the family marketed their grapes through him.

In 1962 the Appellee decided to sell his grapes on his own account under labels showing his name and address (TR. 118-119) but had never at any time used the name Contiente alone (TR. 129).

The testimony indicated that the normal marketing season for the Oakley-Brentwood area is during the months of September and October and that in 1962 and 1963 all of the grapes of the Appellee were marketed under the name of John A. Contiente in British Columbia, Canada (TR. 127-128). This is significant, particularly since there has never been the slightest indication of any actual confusion in the trade at any time, which was admitted by the Appellant (TR. 163). With respect to the scope of use of the family name in connection with the business of the Appellant, it is important to emphasize the fact



that, regardless of the registration of the term *Continente Brand*, the grapes have always been marketed through the one outlet in New York under the label showing *Continente Brand* with the picture of a small girl and the name "G. *Continente*", as indicated by Appellant's Exhibits 5 and 7 (TR. 18, 20).

It is highly relevant that all sales of the Appellant were made through a single outlet, a certain D. L. Scotto in New York (TR. 33, 34, 49, 94) until his death in 1962 (TR. 105). The witness, Bianco, whose testimony was brushed aside by the Trial Court, claimed to represent the Appellant subsequent to the death of Scotto, but the entire fabric of the Appellant's record is suspect when we read the testimony of Napolitano (TR. 106) which we now quote:

"A. We didn't do any business with Bianco in '63. He contacted us, but there was no business.

Q. Has he done some this year?

A. He is going to.

Q. He hasn't yet?

A. Not yet."

The Appellant failed to produce any evidence of actual advertising of the brand in New York or in any other place and this is significant because it is fundamental that a family name is not subject to exclusive appropriation as applied to any goods, regardless of registration under any statute, unless the name has acquired a secondary meaning by reason of long and extensive use and advertising. It is convincingly obvious that the limited use of the family name "*Continente*" by the Appellant in the New York market,



and the absence of advertising, would not support any claim of secondary meaning in the New York area, and could not support any claim of secondary meaning elsewhere in the United States or in any other place.

On page 7 of the brief of the Appellant, certain testimony has been quoted which must be explained to avoid any false impression as to the remarks of the Appellee. We have it in mind that when a statement is quoted out of context or from a written record, the consideration given to the matter by the Trial Court and the action taken should be controlling. It is quite clear that the Appellee, John A. Contiente, was certainly not speaking as a lawyer or as one familiar with legal matters. In the first place, he was expressing his belief that he had a right to use his own name, without understanding that the use of a family name would be governed in a large measure by the same principles as other words and names. The important fact is that he never at any time used the family name "Contiente" alone in connection with the marketing of his grapes. As to the matter of inferior grapes, it seems plain enough that the witness simply meant that the sale of any inferior grapes in the same market might be injurious and this would seem to be a normal and sensible thought, having nothing whatever to do with a comparison of brand names or of personal names. It is to be noted that the Trial Court, hearing the evidence and observing the witnesses, attached no particular significance to such statements.

**EFFECT OF REGISTRATION CLAIMED BY APPELLANT**

Although the Trial Court concluded that the irregularities in the procurement of the registration did not constitute fraud, with which we are not in agreement, we deem it advisable to consider the facts, particularly since the Appellant seeks to over-emphasize the *meaning* of the registration.

It is to be noted that registration No. 691,366 issued on June 15, 1954 covering the words *Continente Brand* for fresh fruits—namely, grapes, apricots, plums, nectarines, and other stone fruits, this being in the name of Giovanni *Continente*, doing business as *G. Continente*. The registration was granted under the provisions of 15 U.S.C. 1052, Section 2 (f) of the Trademark Act of July 5, 1946, based upon a claim of secondary meaning by reason of extensive use. The verified trademark application claimed use of the alleged mark for the goods mentioned above, which was not true (see deposition *Rosa Continente*, pages 16 to 22, Appellant's Interrogatories 6 to 14). Since the Commissioner of Patents was not advised correctly as to the use of the name, the registration certificate was issued much broader in scope than that to which the applicant was entitled.

Proceeding further, we see that on November 25, 1959 the Appellant in this action, *Rosa Continente*, signed and executed a false affidavit for the purpose of retaining the registration under the law, knowing well that the family name had never been used as alleged.

We see now that on October 7, 1964 another affidavit was executed by Rosa Continente (Appellant's Exhibit No. 4) which was signed and filed following the denial of a motion for a preliminary injunction, which affidavit constitutes an admission of the charges made as to the false statements in the original application and in the 1959 affidavit claiming incontestability. Aside from the admission, the affidavit is misleading because there is apparently a calculated omission of a definite requirement in 15 U.S.C. 1065 (2), Section 15 which reads:

“(2) there is no proceeding involving said rights pending in the Patent Office or in a court and not finally disposed of; and”

The significance of this is that the affidavit failed to inform the Commissioner that there was a pending proceeding involving the registration. Obviously if the statutory requirement had been followed, the Commissioner would not have accepted the amendment of correction until the conclusion of the present proceeding.

Having in mind the purpose of our federal trademark statute, it is definitely wrong to endeavor to obtain broader coverage than that sanctioned by the law. In this connection we find that in *The Reese Chemical Co. v. Lisner*, 87 USPQ 121 (1950) the Commissioner held that when an application claimed use of a mark for a number of products and it was established later that this was a false statement, the registration should be cancelled, and he concluded as follows.

“Under these circumstances, I do not believe that the Office should take it upon itself to restrict the registration so as to eliminate all the goods on which the registrant never used the trade mark, and also the goods on which applicant used the trade mark but on which it is no longer using the mark. To do so would carry an implication of condonation of the false allegations, and may also carry an implication that the Patent Office considers the registration valid after it has been limited. I believe that in circumstances such as presented here the Office should cancel the registration entirely, rather than restrict it.”

The federal statute provides expressly that a mark that is primarily merely a surname shall not be registered unless the mark has become distinctive and there is proof of substantially exclusive and continuous use for the five year period preceding the filing of the application (15 U.S.C. 1052, Section 2 (f)), and there is absolutely no evidence of such use in this case, which warrants a consideration of the decision of Judge Caffrey in the recent case of *Blanchard & Co., Inc. et al. v. Charles Gilman & Son, Inc., et al.*, 145 USPQ 62 (DC Mass., 1965) (page 65), involving a lack of secondary meaning, wherein he held that:

“I find and rule that plaintiff’s three trademarks are primarily merely a surname, that the material other than the word ‘Blanchard’ contained in each of the three marks does not obviate the bar of Section 1052-(e)(3), and that consequently these three trademarks were improperly issued, should be, and hereby are, cancelled.”



In the light of the foregoing and on the basis of the testimony and evidence in this case, the argument put forth in the brief of the Appellant as to the exclusive right to use a registered mark in commerce and that there is no requirement to establish a secondary meaning would seem to be specious, to put it mildly. In the first place, since the record here established the fact that the grapes of the Appellant have been sold through one outlet in New York, whereas the grapes of the Appellee have been marketed in British Columbia, we consider as apropos the remarks of the Court in *Dawn Donut Company, Inc. v. Hart's Food Stores, et al.*, 267 F.2d 358, 121 USPQ 430 (CA 2, 1959) (page 434) that:

“The Lanham Act, 15 N.S.C. Sec. 1114, sets out the standard for awarding a registrant relief against the unauthorized use of his mark by another. It provides that the registrant may enjoin only that concurrent use which created a likelihood of public confusion as to the origin of the products in connection with which the marks are used. Therefore if the use of the marks by the registrant and the unauthorized user are confined to two sufficiently distinct and geographically separate markets, with no likelihood that the registrant will expand his use into defendant's market, so that no public confusion is possible, then the registrant is not entitled to enjoin the junior user's use of the mark. See *Fairway Foods, Inc. v. Fairway Markets, Inc.*, 227 F.2d 193, 107 USPQ 253 (9 Cir. 1955); Note, *Developments in the Law of Trademarks and Unfair Competition*, 68 Harv. L. Rev. 814, 857-60 (1955); cf. *Sterling*

Brewers, Inc. v. Cold Springs Brewing Corp.,  
supra."

We consider the Appellant to be in error in attempting to rely heavily on a claimed exclusive right to use and on incontestability. In this connection we deem as highly relevant the remarks of this Court in *Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association*, 345 F.2d 158, 145 USPQ 244 (CA 9, 1965) (page 247) that:

"Without basing any special argument thereon or seeming to attach significance to it, the appellant suggests that since it had filed the required affidavit under the Lanham Act, 15 U.S.C. 1065, it had obtained incontestability of that registration. Appellant properly refrains from arguing that this incontestability provision aids it in its action. There is no attempt here to deny the right of the plaintiff to continue to use the name or mark 'Tillamook'. All that is involved here is the plaintiff's attempt to enjoin the defendant from using its own name on its cheese in the manner previously described, and the right of the defendant to require the appellant to cease from its harassing tactics by which it attempts to prevent customers from purchasing the defendant's product. The provision relating to incontestability is a defensive provision; it has no offensive effect. If plaintiff has attained incontestability of its mark, its registration could not be cancelled by a proceeding to cancel the same. But this does not aid the plaintiff in any claim that it has an exclusive right to the name or mark or that it may rely on the same as a basis for an injunction against



the defendant. In *John Morrell & Co. v. Reliable Packing Co.*, 7 cir., 295 F.2d 314, 316, 131 USPQ 155, 156-157, the court said of incontestability: 'This section (15 U.S.C. Sec. 1115) was intended to protect a registrant from having its mark cancelled by a prior user claiming superior rights.' The court then went on quoting from other authority: '“These statements seem to reflect a misconception of the effect of a registration of a mark, the right to use of which has become incontestable. The effect of ‘incontestability’ is a defensive and not an offensive effect.”’”.

---

**IT IS FUNDAMENTAL ANY RIGHTS IN A FAMILY  
NAME ARE LIMITED IN FACT AND IN LAW**

The weight of authority is overwhelming that a man has a right to make a fair and proper use of his name. There is a great and wide difference between a policy of protecting a family name brand that has actually acquired a secondary meaning as applied to a product, by reason of long and extensive use and advertising, and one that has been used only in an extremely limited fashion in a specific area without any advertising to speak of. It is not difficult to understand that certain brand names of this character have acquired a secondary meaning throughout the nation, such as Eastman for photographic equipment, Campbell's for soup, Gillette for razors, or Williams for shaving soap. The effort made in the brief of the Appellant to place *Continente* in that category is completely ineffectual. The Appellant has referred to the decision of this Court in *The Fleischmann Distill-*

*ing Corporation et al. v. Maier Brewing Company et al.*, 314 F.2d 149, 136 USPQ 508 (CA 9, 1963) in support of a consideration of likelihood of confusion. That proceeding involved one of the best known arbitrary brands in the country, Black & White, for Scotch whisky and the use of the identical mark for beer. There was no question in the case as to differences in marks or in marketing areas. The Court reasoned that the use of Black & White for beer would be associated in the mind of the buyer with Black & White whisky and that there might be a likelihood of confusion as to the source of origin of the products. This is a far cry from the situation with which we are concerned.

Nims, a recognized authority on the subject, in his *Unfair Competition and Trade-Marks*, 4th Edition (1947) Vol. 1, page 192, states that "Every man has a right to the use of his own name. That is the first principle", and on page 571 he states further:

"A family name or surname cannot be appropriated to the exclusion of others who may bear the same name. Therefore a personal or family name cannot be a technical trade-mark."

We note that in a case involving the name Mel's *D & W Food Corp. et al. v. Graham*, 286 P.2d 55, 107 USPQ 24 (Calif. Dist. Ct. App., 1955), page 26, the Court stated:

"The trial judge in directing judgment for the defendant filed the following memorandum decision:

'In this matter it seems to be clear that a person may not be enjoined from using his own name

in his business, provided he is not guilty of fraud, deceit, or artifice in so doing which causes injury or damage to another. No authorities have been presented which make any distinction on principle between the use of one's full name and the use of only a part of his name. In this case the Court finds no fraud, deceit or artifice on the part of defendant in the use he has made or is making of his own name in his business.'"

In addition, the Court stated further that:

"There are really two basic problems involved. One is whether the first in the field has established an exclusive property interest in the name as a trademark that warrants an injunction, and the other is whether the second in the field has been guilty of unfair competition so as to warrant an injunction. The two problems overlap, and the cases do not always recognize the distinction between them. Some of the cases, however, have recognized the distinction. See *Dunston v. Los Angeles Van etc. Co.*, 165 Cal. 89, 94; *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238, 242; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 387; *Tomsky v. Clark*, 73 Cal. App. 412, 417; see also *Bus. & Prof. Code*, Sec. 14400, as compared with *Civ. Code* Sec. 3369.

In the instant case it is quite clear that, as against defendant, plaintiffs do not possess a property right in the use of the name 'Mel's' that is entitled to the protection of an injunction."

In the recent case of *John P. Dant Distillery Co. v. Schenley Distillers, Inc.*, 128 USPQ 456 (DC WD Ky., 1960) the Trial Court held that the trademark John P. Dant is not confusingly similar to the mark

J. W. Dant for whiskey, and this ruling was affirmed on appeal by the Court of Appeals, Sixth Circuit, 132 USPQ 287 (1962). The reasoning in the *Dant* case was approved and followed in *Crane Co. v. Crane Heating & Air Conditioning Co., et al.*, 132 USPQ 478 (CA 6, 1962), in which it was held that the family name Crane was being used fairly and properly, there being no evidence of any damage to the Crane Co., and in this connection (page 479) the Court commented as follows:

“In our opinion, the Crane brothers had the right to use their surname Crane in their business so long as they did not attempt to palm off the products which they handled as products of Crane Co. or mislead the public into believing that they were dealing with Crane Co. *S. C. Johnson & Co. v. Johnson*, 266 F.2d 129, 121 USPQ 63 (CA 6, 1959); *Dant Distillery Co. v. Schenley*, 297 F.2d 935, 132 USPQ 87 (CA 6, 1962) affirming 189 F. Supp. 821, 128 USPQ 456.

It was, of course, proper for R. J. Crane to use his surname in the business which he established known as Crane Co. The Crane brothers have the same privilege so long as they do not attempt to deceive or mislead.”

We contend that there has been no change in the law with respect to personal and family names, and in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 25 Sup. Ct. Rep. 609 (1905), 49 L. Ed. 972 (page 985) Mr. Justice Fuller stated:

“But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the



name 'Remington' is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trademark, and its registration as such could not in itself give it validity. *Brown Chemical Co. v. Meyer*, 139 U.S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 1002; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270."

The problem of the family name was evaluated carefully by Mr. Justice Holmes in *James W. Donnell v. Herring-Hall-Marvin Safe Co. et al.*, 208 U.S. 267, 52 L. Ed. 481 (1907) in holding that the name HALL could not be exclusively appropriated. In this case John A. Contiente, and his father before him, have been engaged in the family grape growing business at Oakley. He is in no sense of the term a newcomer in the field and his use of his own name has been a fair use.

---

#### THERE IS NO LIKELIHOOD OF CONFUSION

The Trial Court found, and properly so, on the basis of the testimony and evidence, that there is no likelihood of confusion (R. 84, 98). In this connection we observe that in the brief of the Appellant there is cited *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108, 150 USPQ 728 (CA 5, 1966) (page 732), and we note that in that decision the Court stated that:

"Likelihood of confusion is a question of fact. The district court had superior opportunity to judge the credibility of the witnesses and to find

the facts. There is support for its findings and they cannot now be set aside as clearly erroneous."

and referred with approval to Rule 52(a), F.R.C.P.; *American Foods, Inc. v. Golden Flake, Inc.*, 312 F.2d 619, 136 USPQ 286 (5 Cir., 1960); *Squirrel Brand Company v. Barnard Nut Co., Inc.*, 224 F.2d 840, 106 USPQ 296 (5 Cir. 1955); and *Chappell v. Goltsman*, 197 F.2d 837, 94 USPQ 40 (5 Cir. 1952).

With respect to the importance of findings of a Trial Court, we note that in *Lerner Stores Corporation v. Lerner*, 162 F.2d 163, 73 USPQ 524 (CA 9, 1947), on page 525, this Court reasoned as follows:

"The trial court found against appellant on each of these controlling questions. Unless the findings of the trial court are clearly erroneous, we are required to affirm the judgment notwithstanding contrary evidence appears but was not accepted by the trial court. We do not understand appellant to dispute this settled principle but, on the contrary, to complain that the court failed to consider evidence free of conflict, a consideration of which would have compelled different findings and a judgment in appellant's favor."

We realize that under certain conditions an independent evaluation of certain questions may be proper, but in the present proceeding we feel strongly that there is no error in the decision of the Trial Court as to any matters of fact or law. We regard as pertinent the statement of this Court in *Plough, Inc. v. Kreis Laboratories et al.*, 314 F.2d 635, 136 USPQ 560 (CA 9, 1963) (page 564) that:



“While it is true that under certain circumstances we are as well able as the trial court to determine if there is a likelihood of confusion by a mere visual or auditory comparison of the marks protected and allegedly infringing, we cannot, on the record here before us, differ with the trial judge, much less hold his findings to be clearly erroneous. See *Chappell et al. v. Goltsman et al.*, 5 Cir. 1952, 197 F.2d 837, 839, 94 USPQ 40, 42.

The mere use of a name which appellees had a right to use can not in and of itself constitute unfair competition.”

We find what we consider to be a convincing statement as to the correct view and approach to the problem in *The Fleetwood Company v. Hazel Bishop, Inc.*, 352 F.2d 841, 147 USPQ 344 (CA 7, 1965) (page 347, wherein the Court concluded that:

“The scope of our review of a district court’s findings of fact in trademark and other actions is limited to a determination of whether such findings are clearly erroneous. *Teter, Inc. v. Rheem Manufacturing Company*, 7 Cir., 334 F.2d 784, 786, 142 USPQ 347, 348 (1964); *Armour & Co. v. Wilson & Co.*, 7 Cir., 274 F.2d 143, 145, 124 USPQ 115, 125 (1960).

The likelihood of consumer confusion between trademarks is a question of fact. *G. D. Searle & Co. v. Chas. Pfizer & Co.*, 7 Cir., 231 F.2d 316, 318, 109 USPQ 6, 7 (1956).”

We submit that the decision of the Trial Court was correct and just on the issue of trademark infringement and unfair competition, and that there is no

testimony or evidence that would suggest that the findings are erroneous in any respect whatever.

---

### CONCLUSION

In view of the foregoing, the Appellee submits that the decision of the District Court should be affirmed and this appeal dismissed with costs.

Dated, San Francisco, California,  
February 2, 1967.

Respectfully submitted,  
WILLIAM G. MACKAY,  
*Attorney for Defendant-Appellee.*

---

### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM G. MACKAY,  
*Attorney for Defendant-Appellee.*



No. 21,124

United States Court of Appeals  
For the Ninth Circuit

---

ROSA CONTINENTE, dba G. CONTINENTE, <i>Plaintiff-Appellant,</i>	}
VS.	
JOHN A. CONTINENTE, <i>Defendant-Appellee.</i>	}

PLAINTIFF-APPELLANT'S REPLY BRIEF

---

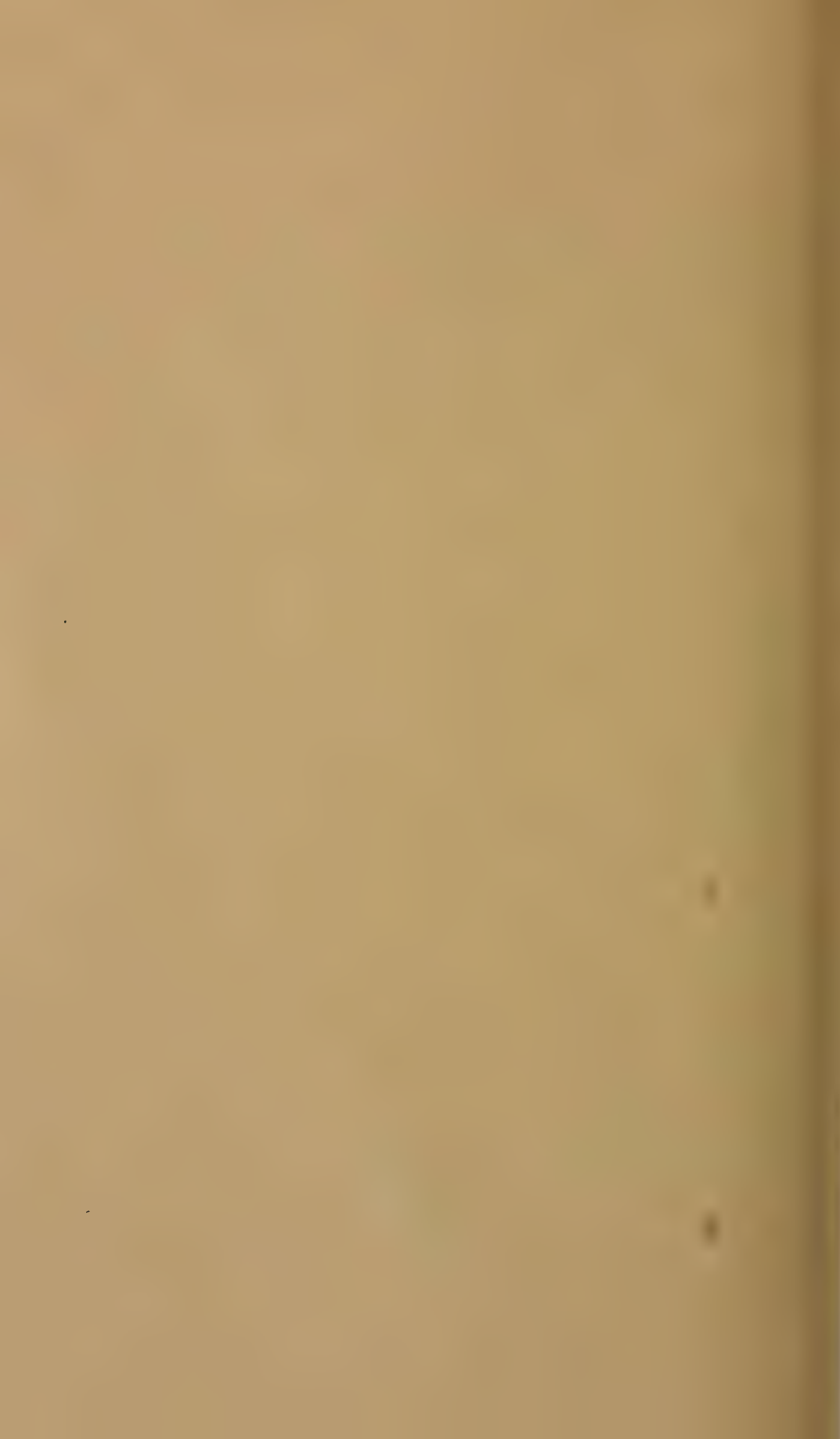
GARDNER & ZIMMERMAN,  
HARRIS ZIMMERMAN,  
1737 First Western Building.  
Oakland, California 94612,  
*Attorneys for*  
*Plaintiff-Appellant.*

FILED

FEB 27 1967

FEB 29 1967

WM. B. LUCK, CLERK



## Subject Index

---

	Page
A. Likelihood of confusion .....	1
B. The effect of plaintiff's incontestible registration .....	4
C. The purported "sacred" right of defendant to use his name .....	6

---

## Table of Authorities Cited

---

Cases	Page
Apple Growers Assn. v. Pelletti Fruit Co., 153 F.Supp. 948 (N.D. Cal. 1957) .....	5
Blanchard & Co., et al. v. Charles Gilman & Son, Inc., et al., 239 F.Supp. 827 (D. Mass. 1965) .....	4
Crane Co. v. Crane Heating & Air Conditioning Co., et al., 299 F.2d 577 (6th Cir. 1962) .....	7
John P. Dant Distillery Co. v. Schenley Distillers, Inc., 189 F.Supp. 821, 128 USPQ 456 (W.D. Ky. 1960) .....	6
Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., et al., 267 F.2d 358 (2nd Cir. 1959) .....	3
D & W Food Corp. et al. v. Graham, 286 P.2d 55 (Cal. D. C. of A. 1955) .....	7
The Fleischmann Distilling Corporation, et al. v. Maier Brewing Company, et al., 314 F.2d 149 (9th Cir. 1963) .....	1
Miles Shoes, Inc. v. R. H. Macy & Co., 199 F.2d 602 (2nd Cir. 1952) .....	2
The Reese Chemical Co. v. Lisner, 87 USPQ 121 (Comm. Pat. 950) .....	5



	Pages
Sleeper Lounge Company v. Bell Manufacturing Co., 253 F.2d 720 (9th Cir. 1958).....	1
Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association, 345 F.2d 158 (9th Cir. 1965)....	4

**Statutes**

Lanham Act, 15 U.S. Code, Section 1052(f) .....	4, 6
---	------

**Texts**

1 Nims, Unfair Competition and Trade-Marks (4th Edition, 1947), page 192 .....	6
---	---

No. 21,124

**United States Court of Appeals  
For the Ninth Circuit**

---

ROSA CONTINENTE, dba G. CONTINENTE,  vs. JOHN A. CONTINENTE,  	}	<i>Plaintiff-Appellant,</i>  <i>Defendant-Appellee.</i>
--	---	---

**PLAINTIFF-APPELLANT'S REPLY BRIEF**

---

Plaintiff submits this reply to certain points which are raised in the Brief for Defendant-Appellee.

---

**A. LIKELIHOOD OF CONFUSION**

As to likelihood of confusion, irrespective of the views of the 5th Circuit, as expressed in the decisions cited in defendant's brief, this court has adopted the more widely held view that "we are in as good a position as the trial judge to determine the probability of confusion". *Sleeper Lounge Company v. Bell Manufacturing Co.*, 253 F.2d 720 (9th Cir. 1958); *The Fleischmann Distilling Corporation, et al. v. Maier Brewing Company, et al.*, 314 F.2d 149 (9th Cir. 1963).

The quoted and approved language was taken by this circuit from *Miles Shoes, Inc. v. R. H. Macy & Co.*, 199 F.2d 602 (2nd Cir. 1952).

The defendant contends in his brief that he never used the name "CONTINENTE" alone. Defendant's original labels, as shown in plaintiff's exhibit 34, as originally printed and applied to the grape lug boxes, admittedly consisted of the word "CONTINENTE" alone; but were later allegedly modified by the addition of rubber stamping "JOHN A." on such labels before the grapes were shipped in commerce. Plaintiff has no assurance that defendant will not in the future again print plain "CONTINENTE" labels, and ship his grapes as such.

The defendant further contends that plaintiff's grapes have always been marketed under a label showing "CONTINENTE BRAND" with the picture of a small girl, as indicated in plaintiff's exhibit 5. It is submitted, however, that plaintiff also uses her registered CONTINENTE mark without such a picture, as is clear from the side imprints or inserts found in plaintiff's exhibits 7 and 8. The various auction reports concerning the sale of plaintiff's CONTINENTE grapes and which are posted at the auctions (Tr. 106-107), likewise do not include any such picture; nor does plaintiff's registration (plaintiff's exhibits 1 and 3) which is directed to the word "CONTINENTE" alone.

While plaintiff may have used a broker in New York City, auctions of plaintiff's grapes take place in Jersey City (Tr. 95) and purchasers come from

Boston and all over the country (Tr. 96). Also, when jobbers contact plaintiff by phone for "CONTINENTE" grapes (Tr. 75-76), no picture is present.

The real issue thus remains as to whether "JOHN A. CONTINENTE", when used in a trademark sense, and which in at least one established situation was abbreviated by a third party to "J. CONTINENTE", is confusingly similar to the registered mark "CONTINENTE" for the identical product, namely juice grapes, when each product is grown and shipped from the identical geographical area. This should be answered in the affirmative.

This is not a case of two independent firms doing business under similar marks or names in separate and distinct geographical areas, such as in *Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., et al.*, 267 F.2d 358 (2nd Cir. 1959), strongly relied upon by defendant herein. Here, plaintiff and defendant are doing business literally next door to each other, i.e., in the same identical market. The fact that some of the ultimate purchasers of the respective products may be geographically separated does not alter the fact that the defendant uses his confusingly similar and infringing mark in the identical area wherein plaintiff's registered mark is used.

## B. THE EFFECT OF PLAINTIFF'S INCONTESTIBLE REGISTRATION

For the reasons and under the authority set forth in plaintiff's opening brief, plaintiff may properly rely upon her rights under her registration.

In *Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association*, 345 F.2d 158 (9th Cir. 1965), cited by defendant in attempting to refute plaintiff's position, the situation was entirely different from the case at bar wherein defendant is a "Johnny-come-lately" in his usage of the infringing mark. In *Tillamook*, both the trial court and the appellate court found and held that it was the defendant who first adopted and used the trademark in question. Under such circumstances the plaintiff's subsequent use and registration could not operate to deprive the defendant of its prior rights.

Defendant also cites *Blanchard & Co., et al. v. Charles Gilman & Son, Inc., et al.*, 239 F.Supp. 827 (D. Mass. 1965), which is not pertinent to the facts of this case, since in *Blanchard*, the registrant apparently failed to file under the provisions of U. S. Code, Title 15, Section 1052 (f) which provides for registration of surnames, and under which plaintiff herein procured her registration.

Defendant also attacks plaintiff's registration on the grounds of alleged wrongful conduct in procuring and/or maintaining the same. The court below found no such wrongful conduct, and no appeal was taken by defendant as to the finding of validity of the registration in suit (R. 99). The most that can be made out of



defendant's contentions is that the application as filed erroneously listed additional products to grapes. If the Patent Office granted registration on *all* of such goods, it obviously would have granted it on fewer goods, or on grapes alone. When the error was called to plaintiff's attention, the registration was promptly rectified in accordance with the provisions of the Lanham Act (plaintiff's exhibit 4), and the amended registration (plaintiff's exhibit 3) was duly and regularly issued.

No question has been raised, nor could be raised as to plaintiff's long and continuous use of her mark on grapes, and it is the defendant's use of his mark on precisely the same goods of which complaint is made.

The burden is on defendant to establish fraud, and this was not done in the court below. *Apple Growers Assn. v. Pelletti Fruit Co.*, 153 F.Supp. 948 (N.D., Cal. 1957).

In *The Reese Chemical Co. v. Lisner*, 87 USPQ 121 (Comm. Pat. 1950), cited by defendant, a mere administrative ruling by the Patent Office was made concerning a registration wherein the registrant had *not* requested restriction of his registration to the goods on which he had in fact used his mark. The Patent Office refused to make such a restriction on its own. This is contrary to the facts herein, wherein such request was made by the plaintiff and granted by the Patent Office.



**C. THE PURPORTED "SACRED" RIGHT OF  
DEFENDANT TO USE HIS NAME**

The defendant's brief quotes from page 192 of Nims Unfair Competition and Trade-Marks, 4th Edition (1947) Vol. 1, that "Every man has a right to the use of his own name. That is the first principle." The defendant failed to quote the next sentence, which reads:

"To this the law of unfair competition gradually is adding another—no man may use even his own name in such manner as to injure another unfairly or fraudulently in his business."

Plaintiff herein is not attempting to deprive the defendant from using his own name. He may use his name in all his personal, social and business dealings, other than as an infringing trademark of which complaint is made herein. When using even his own name as a trademark for grapes, defendant is using his name unfairly and in derogation of plaintiff's rights.

If defendant's position was legally sound there would be no benefit whatsoever in the registration of a surname, permitted under the Lanham Act, 15 U. S. Code, Title 15, Section 1052 (f) if every other person having such a surname could use it as a trademark.

The cases cited by defendant are not pertinent to the issues herein.

In *John P. Dant Distillery Co. v. Schenley Distillers, Inc.*, 189 F.Supp. 821, 128 USPQ 456 (W.D. Ky. 1960), plaintiff and defendant had each used their respective marks for over 50 years without complaint, and it was held to be unequitable to complain at such a late date. In the case at bar, written complaint was

made before defendant made his first shipment (plaintiff's exhibit 39).

In *D & W Food Corp. et al. v. Graham*, 286 P.2d 55 (Cal. D. C. of A. 1955) the situation involved the use of a common law trade *name*, not a federally registered trade *mark* and its effect.

In *Crane Co. v. Crane Heating & Air Conditioning Co., et al.*, 299 F.2d 577 (6th Cir. 1962), defendant's use of their surname was as a trade *name* and not as a trade *mark*. Furthermore, plaintiff had known of defendant's use and had actually encouraged such use; and others had used "Crane" as a trade name for over 50 years. No such factors are present here.

For the reasons stated, plaintiff-appellant urges that the judgment of the District Court be reversed.

Dated, Oakland, California,  
February 24, 1967.

Respectfully submitted,

GARDNER & ZIMMERMAN,

By HARRIS ZIMMERMAN,

*Attorneys for*

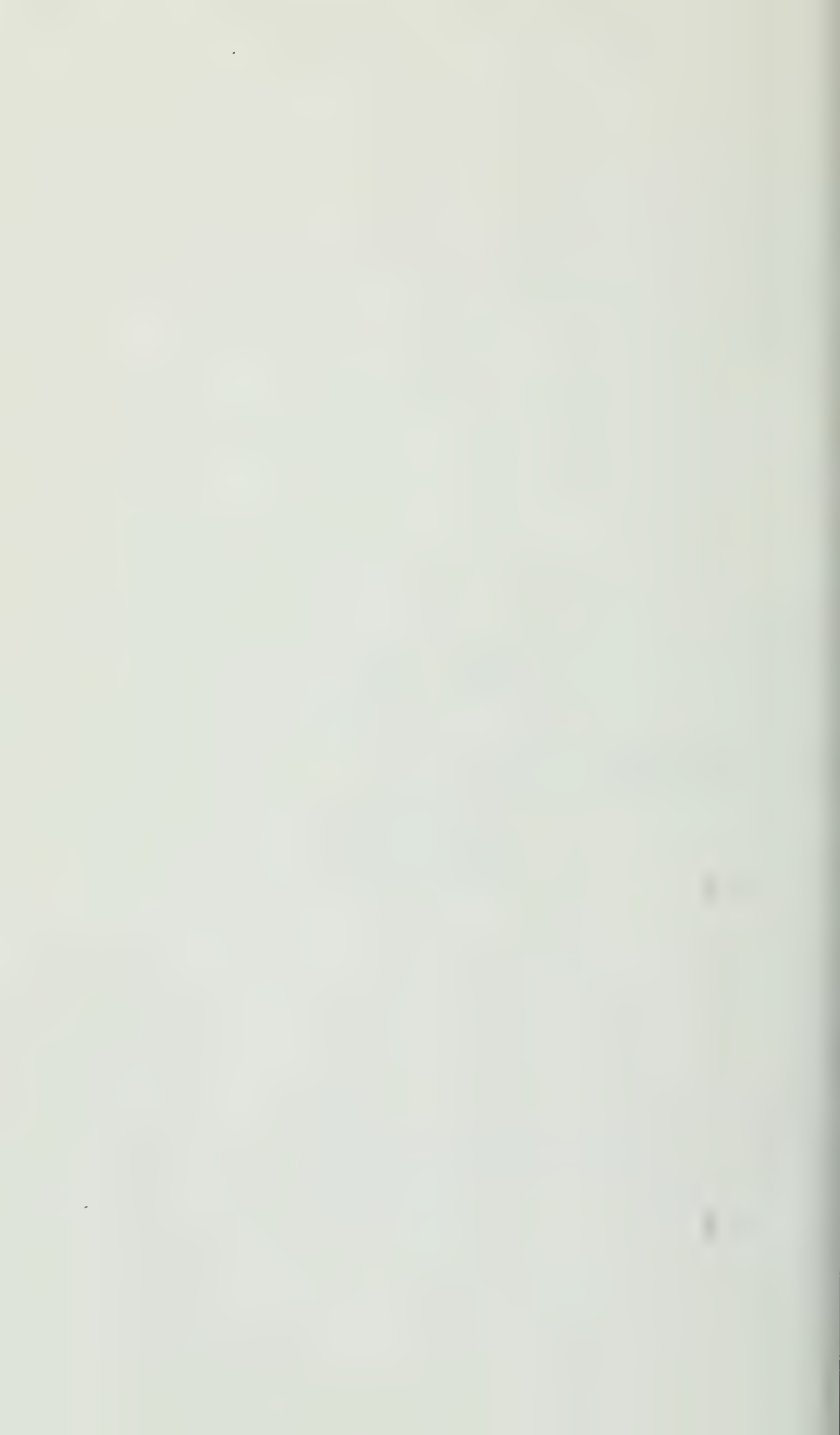
*Plaintiff-Appellant.*



CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS ZIMMERMAN,  
*Attorney for Appellant.*



---

**In the United States Court of Appeals  
for the Ninth Circuit**

---

**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**HORACE MEYER, ET AL., APPELLEES**

---

**Appeal from the United States District Court for the  
Northern District of California, Northern Division**

---

**BRIEF FOR THE UNITED STATES, APPELLANT**

---

**EDWIN L. WEISL, JR.,**  
*Assistant Attorney General.*

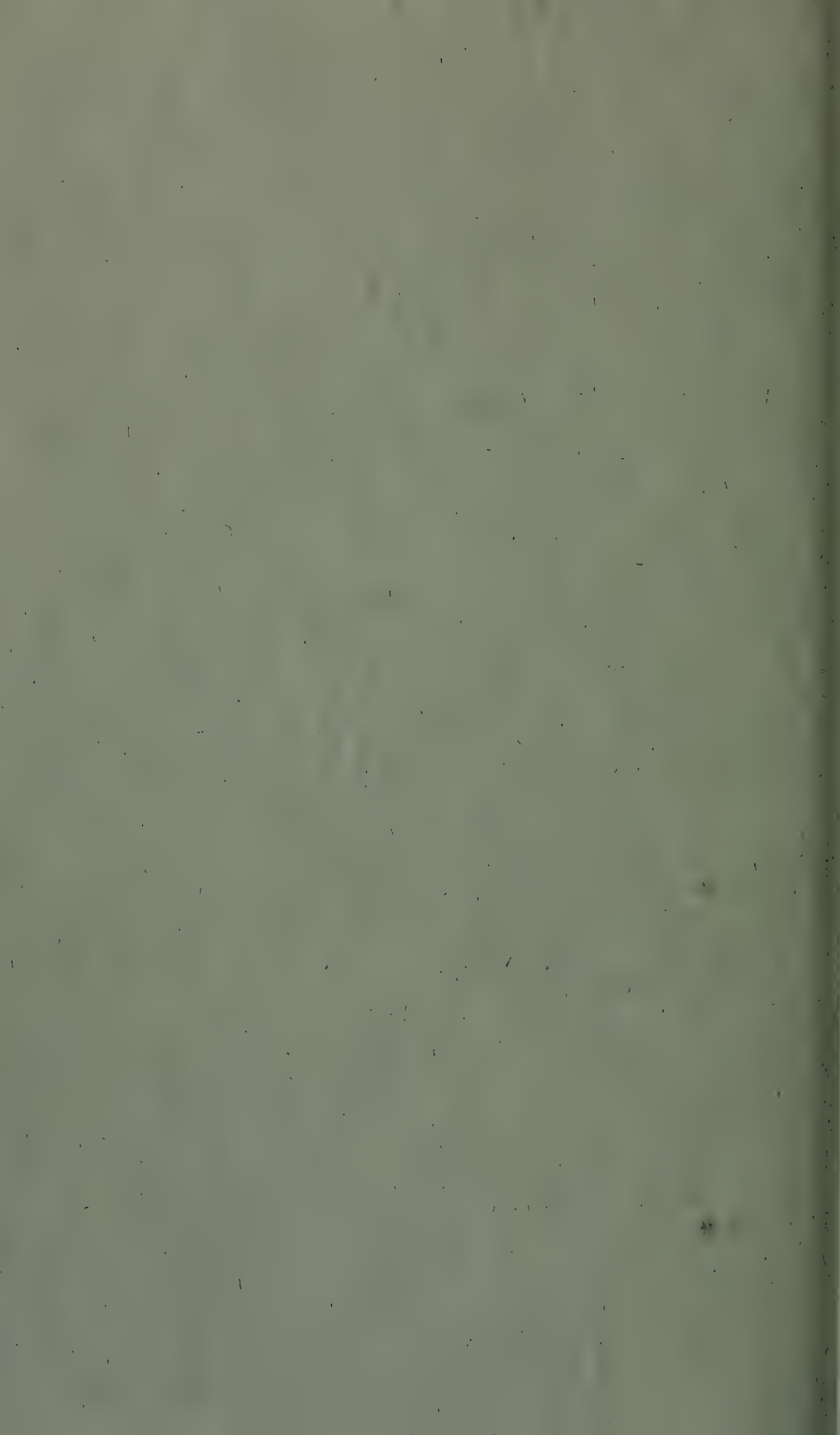
**CECIL F. POOLE,**  
*United States Attorney,  
San Francisco, California, 94102.*

**A. LAWRENCE BURBANK,**  
*Assistant United States Attorney,  
San Francisco, California, 94102.*

**ROGER P. MARQUIS,**  
*Attorney, Department of Justice,  
Washington, D. C., 20530.*

---





# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Federal rules involved .....	2
Statement .....	10
Specification of errors .....	20
Summary of argument .....	20
Argument:	
I. The federal discovery rules do not accord a party a right to compel revelation of everything he would like to know from his opponent or possible witnesses .....	27
II. Ground for discovery of the materials refused was not shown by appellee .....	30
A. Purely factual data was not refused .....	30
B. No good cause was shown for requiring discovery of the matters refused .....	30
C. The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case .....	33
III. The protective provisions of the discovery rules should preclude the unlimited discovery sought by appellee .....	40
A. The discovery here sought was unjust to the public .....	41
B. The discovery here sought would annoy and embarrass the appraisers .....	46
C. The "work product" principle of <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947), should preclude the discovery here sought .....	49

Argument—Continued	Page
D. The purposes of the discovery rules will not be served by the discovery here ordered .....	52
IV. In any event, the district court had no jurisdiction to set aside the declaration of taking and dismiss the proceeding .....	56
Conclusion .....	59

## CITATIONS

## Cases:

<i>Batten v. United States</i> , 306 F.2d 580, cert. den., 371 U.S. 955 .....	43
<i>Continental Distillery Corp. v. Humphrey</i> , 17 F.R.D. 237 .....	31
<i>Dicker v. United States</i> , 352 F.2d 455, cert. den., 383 U.S. 936 .....	36
<i>Evans v. United States</i> , 326 F.2d 827 .....	32
<i>Hickey v. United States</i> , 18 F.R.D. 88 .....	48
<i>Hickman v. Taylor</i> , 329 U.S. 495 .....	27, 49
<i>Home Ins. Co. v. Balt. Warehouse Co.</i> , 93 U.S. 527 .....	38
<i>Justice v. United States</i> , 145 F.2d 110 .....	37
<i>Lewis v. United Air Lines Transport Corporation</i> , 32 F.Supp. 21 .....	54
<i>McCandless v. United States</i> , 298 U.S. 342 .....	52
<i>Ruud v. United States</i> , 256 F.2d 460 .....	35
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 .....	29, 31
<i>Searl v. School District, Lake County</i> , 133 U.S. 553 .....	41
<i>Slattery Company v. United States</i> , 231 F.2d 37 .....	37
<i>United States v. Bennett</i> , 14 F.R.D. 166 .....	51
<i>United States v. Certain Acres of Land</i> , 18 F.R.D. 98 .....	55
<i>United States v. Certain Parcels of Land, Etc.</i> , 15 F.R.D. 224 .....	33, 36
<i>United States v. Certain Parcels in Philadelphia (Wainwright)</i> , 130 F.2d 782 .....	43
<i>United States v. Certain Parcels of Land in Rapides Parish</i> , 149 F.2d 81 .....	34

## Cases—Continued

## Page

<i>United States v. Certain Parcels of Land in San Francisco</i> , 25 F.R.D. 192 .....	33, 51
<i>United States v. Chapman</i> , 158 F.2d 417 .....	42
<i>United States v. Cobb</i> , 328 F.2d 115 .....	57
<i>United States v. Glanat Realty Corp.</i> , 276 F.2d 264 .....	34
<i>United States v. Johnson</i> , 285 F.2d 35 .....	37, 53
<i>United States v. Miller</i> , 317 U.S. 369 .....	34
<i>United States v. Sherwood</i> , 312 U.S. 584 .....	57
<i>United States v. 4.724 Acres of Land in Plaquemines Parish</i> , 31 F.R.D. 290 .....	33, 51
<i>United States v. 6.82 Acres of Land in Bernalillo County</i> , 18 F.R.D. 195 .....	31, 33, 55
<i>United States v. 25,406 Acres of Land in Arlington County, Va.</i> , 172 F.2d 990 .....	53
<i>United States v. 60.14 Acres of Land in Warren and McKean Counties</i> , 362 F.2d 660 .....	35, 37, 43, 54
<i>United States v. 900.57 Acres in Johnson and Logan Counties</i> , 30 F.R.D. 512 .....	55
<i>United States v. 7,534.04 Acres in Bartow and Cherokee Counties</i> , 18 F.R.D. 146 .....	51
<i>United States v. 13,255.53 Acres of Land in Burlington and Ocean Counties</i> , 158 F.2d 874 .....	37
<i>United States v. 284,392 Square Feet of Floor Space, Etc.</i> , 203 F.Supp. 75 .....	33, 51
<i>United States ex rel. T.V.A. v. Powelson</i> , 319 U.S. 266 .....	34
<i>Wilson v. United States</i> , 350 F.2d 901 .....	34

## Federal Rules of Civil Procedure:

Rules 26-37 .....	27
Rule 26 .....	30
Rule 26(b) .....	28, 33, 34
Rule 30(b) .....	29, 31, 40, 45, 48
Rule 30(d) .....	40, 48
Rule 34 .....	29, 30, 31
Rule 35 .....	29
Rule 37(b) .....	57, 58
Rule 37(b) (2) (ii) .....	58
Rule 37(b) (2) (iii) .....	58

# IV

Federal Rules of Civil Procedure—Continued	Page
Rule 71A .....	57
Rule 71A (a) .....	57
Rule 71A (e) .....	32
Rule 71A (j) .....	55

## Miscellaneous:

Friedenthal, <i>Discovery and Use of an Adverse Party's Expert Information</i> , 14 Stanford L. Rev. 455 .....	51
4 Moore, <i>Federal Practice</i> (2d ed. 1963) sec. 34.02 (2) .....	31

**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 21127

UNITED STATES OF AMERICA, APPELLANT

*v.*

HORACE MEYER, ET AL., APPELLEES

---

Appeal from the United States District Court for the  
Northern District of California, Northern Division

---

BRIEF FOR THE UNITED STATES, APPELLANT

---

**OPINION BELOW**

The opinion of the district court is reported at 38  
F.R.D. 411.

**JURISDICTION**

The jurisdiction of the district court over this condemnation suit was invoked under 28 U.S.C. sec. 1358. Judgment of dismissal was entered on May 10, 1966 (R. 163-164). Notice of appeal was filed by the United States on May 26, 1966 (R. 165).



## QUESTIONS PRESENTED

1. Whether the discovery provisions of the Federal Rules of Civil Procedure compel the disclosure, by independent appraisers employed by the United States to value land to be acquired, of unapproved and unaccepted appraisals, of all notes made in connection therewith and of their reasoning in, for example, considering particular sales not to be comparable, all without any showing of special need for such disclosure, and where the facts they relied upon, such as location of the property, etc., were disclosed.

2. Whether a district court is authorized to strike a declaration of taking and to dismiss condemnation proceedings for failure to make such discovery.

## FEDERAL RULES INVOLVED

Rule 26, Federal Rules of Civil Procedure, provides:

(a) When Depositions May be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that

in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 30 provides:

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written

interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

\* \* \* \*

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose

upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Rule 34 provides:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 37 provides:

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the



district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copy-

ing, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn



denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) Failure to Respond to Letters Rogatory. A subpoena may be issued as provided in Title 28 U.S.C., § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

Rule 71A provides:

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the

power of eminent domain, except as otherwise provided in this rule.

\* \* \* \*

(c) Complaint.

\* \* \* \*

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. \* \* \*

\* \* \* \*

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading

or motion asserting any additional defense or objection shall be allowed.

### STATEMENT

On January 15, 1964, a complaint, together with a declaration of taking, was filed by the United States to acquire two designated parcels of land, totaling 364 acres, owned by Horace Meyer, for use in connection with the Yosemite National Park (R. 1-11). An order for immediate delivery of possession was entered the same day (R. 12). Horace Meyer sought distribution of the \$325,500 deposited as estimated compensation, and it was so ordered (R. 14-18).

On September 30, 1964, Meyer gave notice of the taking of depositions of Robert Wilson, James Hopper and Charles Sortor (R. 20-21). The subpoenas sought "all records, maps, photographs, data on comparable sales, reports on water supply or the lack thereof, a complete list of the settlements and payments made by the United States for Foresta lots or property, together with a list of Foresta lots, if any, which have not been acquired, subdivision reports, utility company reports, soil or agricultural report, books, papers, documents and tangible things which now are or may be in your possession, and which are related to the above entitled cause" (R. 59, 60). His petition alleged residence of the named persons and asked the court to fix the place of deposition at the office of Meyer's counsel (R. 23-24). On October 12, 1964, the United States moved for a protective order limiting the extent of the depositions, stating, *inter alia*, that the United States had not yet determined which,

if any, of the named persons would be called as expert witnesses at the trial (R. 29). Appropriate stay order was sought and obtained pending a ruling on the motion (R. 25-28).

The issue was briefed by the parties (R. 44-103). On October 27, 1965, the district court filed its opinion, holding that discovery should be ordered without limitation (R. 104-113). On November 1, 1965, an order appropriate for an interlocutory appeal under 28 U.S.C. sec. 1292(b) was entered (R. 114). This Court, by order of November 23, 1965, denied an interlocutory appeal under the authority of *United States v. Woodbury*, 263 F.2d 784 (C.A. 9, 1959) (R. 115).

The depositions were taken on January 10, 1966, first of Robert Wilson, then of Charles Sortor and finally of James Hopper. They followed a similar pattern. Each had turned his files over to the Assistant United States Attorney. Mr. Wilson described his real estate appraisal experience, his employment by the National Park Service, and the actions he took in connection with his appraisal, including his visits to the Meyer properties (W. Tr. 2-5, 12-19, 24-25, 26).<sup>1</sup> When Meyer's counsel demanded the production of all papers listed in the subpoena, the witness replied that they had been turned over to the Assistant United States Attorney in three folders. The latter said he would make available those materials he believed to be proper subject of discovery (W. Tr. 7).

---

<sup>1</sup> For purposes of this brief "Tr." refers to the transcripts of the depositions, while "W." indicates Wilson, "S" Sortor and "H" Hopper.



The deposition proceedings continued to define what was and what was not produced and may be briefly summarized as follows: Three file folders, containing the papers produced by Mr. Wilson, were marked Exhibits B, C, and D, and Meyer's counsel demanded that they be turned over to him *in toto* (W. Tr. 9-10). This was refused, the government attorney making clear that no claim was made of attorney-client privilege between the appraiser and the federal attorney (W. Tr. 10). The government position was stated as follows (W. Tr. 10-11):

MR. BURBANK: With respect to both Defendant's Exhibit "C" and Defendant's Exhibit "D" for identification, "E" for identification, it is my position again with respect to each of those, as it was with respect to Defendant's "B", that you are not entitled to have a blanket inspection of Mr. Wilson's files, the materials in the files which under appropriate questioning is a proper area of discovery. It is not my intention to prevent you from having that. But a blanket inspection of Mr. Wilson's files I continue to resist.

MR. ROBINSON: And would you, Mr. Notary, instruct Mr. Burbank to turn over Defendant's Exhibit "C" and "D" for identification.

THE NOTARY-REPORTER: Mr. Burbank, will you please turn over those exhibits for identification to Mr. Robinson?

MR. BURBANK: I respectfully decline to do so.

Matters that were produced were the appraiser's contract of employment and letters concerning employment (W. Tr. 13-18). A copy of a map without

the deponent's notations was offered to Meyer's counsel (W. Tr. 23), and answers to the amount paid him for appraising the Meyer property and for appraising other property were not objected to (W. Tr. 29, 31). When production of the witness' appraisal report was refused, the following colloquy occurred (W. Tr. 33):

MR. ROBINSON: All right. I take it if I asked him any additional questions in connection with Defendant's Exhibit "N" there would be the same objection and there would be the same direction; is that correct?

MR. BURBANK: Not necessarily. My objection only goes to an area of inquiry which calls for his opinion. If there are factual materials in there that are not as readily available to the landowner as they were to Mr. Wilson I would feel that you are entitled to have that material. There may be photographs therein that I would feel you would be entitled to examine. My instructions are based, insofar as it deals with any opinionated<sup>2</sup> material, either preliminary or conclusive, formulated by Mr. Wilson and expressed in that report.

MR. ROBINSON: Q. How many pages in that report, Mr. Wilson?

A. Approximately 31.

Copies of nine photographs attached to the report were not objected to (W. Tr. 34), nor were an attached map without notations (W. Tr. 37) and a map of the National Park System (W. Tr. 38). No ob-

---

<sup>2</sup> This word appears throughout the transcripts. It should read "opinionative."



jection was made to testimony that the witness was employed by the Department of Justice to appraise the Meyer property, that he had made no report and that he had not finished his work (W. Tr. 48-49).

Material refused was a sheet containing pencil notations of Mr. Wilson, which was an enclosure in a letter concerning his employment (W. Tr. 17), and a map with similar notations, as follows (W. Tr. 21):

MR. BURBANK: Let me ask you this question, Mr. Wilson. There is a lot of pencil notations appearing on this map. What do those pencil notations reflect?

A. These would reflect considerable field notes and interviews, and some notes on different people, where they live, mileage, little sketches on the road blown up.

MR. BURBANK: Does any of this material reflect opinions made by you on making the appraisal of this property?

A. Yes.

MR. BURBANK: I respectfully refuse to produce that. Do you want it marked for identification?

MR. ROBINSON: Yes, mark it for identification.

MR. BURBANK: Incidentally, Mr. Robinson, I am sure that Mr. Wilson has in his files—if he doesn't I will produce it for you to save you unnecessary inquiry—we have prepared a map of the Big Meadow and McCauley 40 in somewhat considerable detail. I believe it is in Mr. Wilson's file.

Also refused were two other maps with similar notations (W. Tr. 25, 26); the answer to questions as

to when and of what other properties he had made appraisals (W. Tr. 27); the length of time he had spent on such other appraisals, especially of some 50 properties 30 miles or more away from the Meyer land; his opinions of value of those other properties and other details, such as whether severance damage was involved (W. Tr. 28-29, 31); his appraisal report (W. Tr. 31-32); the number of comparables shown therein (W. Tr. 32); maps attached to the witness' appraisal report, which contained notations in blue or red pencil (W. Tr. 34); and a letter in his files from the Department of Justice and a sheet with some scribbled notes on it (W. Tr. 38). Meyer's counsel said (W. Tr. 38-39):

MR. BURBANK: Let me ask you this. Do you want copies of the National Park System?

MR. ROBINSON: Well, I would like copies of everything that is available to me. As a matter of fact, I would like everything.

After stating that he had arrived at an opinion of market value of the property, answer was refused as to the amount of that valuation, of portions of the property, as to sales considered, as to nature and character of the property, as to highest and best use (W. Tr. 42-47), and as to information he obtained from the assessor's office in Mariposa (W. Tr. 50). Meyer's counsel stated (W. Tr. 52):

MR. ROBINSON: Now with reference—and I address this primarily to you, counsel—with reference to so-called comparable sales, I would want the record to show that I desire to go into each

and every one of them that he has used or that he has investigated and decided not to use, I would want to go into the reason why he either used it or didn't use it. I want to go into all the material facts with reference to the comparability or the lack of comparability, and naturally into the date and the sales price, and matters of that kind insofar as comparable or so-called comparable sales or rejected sales that were concluded not to be comparable. I take it in each one of those you would direct him not to answer, and we would have the usual stipulation. Would that be correct?

MR. BURBANK: With respect to each of those areas of inquiry, at my request I direct he not answer, and the same stipulation will apply in similar circumstances.

Answer was then refused to a series of questions as to whom he had consulted with regard to valuation of the property (W. Tr. 53-54), and as to specific sales (W. Tr. 55-57).

In conclusion, the appraiser testified that his refusal to answer was under instructions from the Assistant United States Attorney (W. Tr. 55). With this background, examination of Charles Sortor, a consulting engineer and appraiser, was substantially the same. Speaking of Mr. Sortor's appraisal report, the government attorney stated (S. Tr. 8-9):

MR. ROBINSON: I haven't seen it. I wonder if you would go through it and indicate to me what part you are willing to let me have and what part not.

MR. BURBANK: The report contains, among other things, nineteen photographs which I have

no objection to producing. A Horace Meyer plot map which I have no objection to producing. An area map—incidentally the area map is the area referred to in the deposition as Boundary Revision Map NP-YOS/2262 Y8-47-76. And what appears to be a portion of an automobile map Chevron automobile map. To those matters I have no objection.

MR. ROBINSON: Could I have those now then for the purpose of examining the witness?

MR. BURBANK: The record may show that I am handing Mr. Robinson pages 21, 22, 23, 24, 25, 26, each of which contain photographs and some explanatory material—I'm sorry—25 and 26 I am respectfully refusing to produce, it contains four photographs which apparently deal with alleged comparable transactions. Pages 21 through 25 inclusive are turned over. Also the Horace Meyer plot maps; also the area map referred to earlier as the Boundary Revision Map prepared by the National Park Service.

Later, the following colloquy occurred (S. Tr. 17-18):

MR. ROBINSON: Yes. Were there any soil analysis or drillings or borings made either in connection with that either before or after?

MR. BURBANK: We have had some drillings, borings made. The final report on that has been done by a combination of U. S. Bureau of Reclamation personnel and U. S. Geological Survey personnel. I have not as yet received a final report, completed report. When that report has been made, has been completed to the extent that it deals with facts and material, and material which I am sure would not be as readily availa-



ble to Mr. Meyer as it is to us, with the appropriate understanding with respect to compensation, which I concede you may have the right to contest, if you will, I have no objection to allowing you the opportunity to examine that report.

So also, Mr. Hopper's deposition was abbreviated. During his examination, the following occurred (H. Tr. 15-16):

Q. Now, is August 21, 1962 the last appraisal that you made on any of either Meyer or Foresta properties?

A. No, sir.

Q. When is the last one?

A. I just recently completed an appraisal of several improved properties within the Foresta subdivision. I say recently, within the last sixty days.

Q. And you didn't bring that file with you, is that it, or those files?

A. No, I didn't.

Q. Why?

A. Well, frankly I don't know. It never occurred to me. They weren't in the drawer with all of this stuff and I never thought of it until you just now asked the question.

Q. How would you describe those files?

A. How would I describe them?

Q. Yes.

MR. BURBANK: Perhaps I can save you some time. I will instruct Mr. Hopper to turn those files over to me and I will be happy to give you a letter advising as to what those files contain. Frankly, I learned of these appraisals for the

first time at lunch today. I didn't even know that they had been done.

MR. ROBINSON: Well, I want them included in the deposition.

\* \* \* \*

MR. ROBINSON: Q. How many of those are there?

A. There were seven, I believe, individual properties, all of the reports contained in one appraisal report.

Q. How would you identify that report?

A. As I recall, on the front of the report just as it was on these others, there is a front sheet which states "Appraisal of" and the name of these various properties, that is the names of the owners of these various properties.

Q. Tell us the names of all of the owners you can recall at the present time.

A. Hummell—gee, I just can't remember the names of any of the others, Mr. Robinson.

Q. Some seven or eight?

A. Seven of them.

Q. Seven. You filed that report sixty days ago, was that it?

A. Sometime within the last sixty days.

The witness testified that he had made an appraisal of the Meyer property in 1952 and discovery was demanded of all of the details of that appraisal (H. Tr. 20-21).

In April 1966, appellee moved to cite the appraisers for contempt for refusal to turn their files over to him (R. 121-124, 128-131). After hearing, the court made findings summarizing the earlier proceedings, and stating that at the hearing counsel for



the United States took full responsibility for refusal of the appraisers to produce documents or to answer questions (R. 156-160). The court concluded that it would be futile to order the appraisers to respond and that the United States had acted wilfully and in disobedience of the court's orders and is in contempt of the court (R. 160-161). Under Rules 37 and 45, F.R.Civ.P., and under its inherent power, judgment was entered dismissing the cause of action and ordering that the complaint, declaration of taking and order for delivery of possession "be stricken from the court's records" (R. 164).

### SPECIFICATION OF ERRORS

1. The district court lacked jurisdiction to dismiss the case.

2. The district court erred:

(a) in refusing to limit the discovery sought by appellee.

(b) in denying the motion of the United States for a protective order.

(c) in not denying the motion to compel answer to questions propounded on deposition.

(d) in holding that the matters sought by appellee were the proper subject of discovery.

### SUMMARY OF ARGUMENT

#### I

In *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the Supreme Court has made it clear that the discovery

provision of the Federal Rules of Civil Procedure are of limited application. They are not to be read as compelling the delivery to a party of all materials, notes and even mental processes which his opponent or his witnesses have gathered or performed in preparing his case. The holding of the court below that discovery knows no bounds is plainly wrong.

## II

A. Purely factual matters, such as maps of the area and the land condemned, photographs and the like, were supplied, even though no showing was made that this information was not equally, if not more readily, available to the demanding party, the landowner. The materials refused were the opinions, reasoning processes, notes, etc., of the independent appraisers whose results or processes had not been approved or accepted by the United States, or even in some instances not completed, and matters clearly not admissible in evidence, such as settlements or appraisals of other properties.

B. Not the slightest attempt was made to show good cause for requiring unlimited disclosure of the appraisers' files and thoughts. The district court excused this on the theory that no such showing was required in federal condemnation cases. Neither the rules nor the Supreme Court decisions warrant any such expansion of the rules for this particular class of cases.

The principal basis for this position seems to have been the district court's view that both parties to a condemnation case should definitively state their

claims as to the amount of just compensation prior to trial. The Federal Rule, 71A, provides otherwise. No specification as to the amount of claimed compensation is provided for either as to the complaint or as to the answer. The rule is specific that only those pleadings shall be filed and that "No other pleading or motion asserting any additional defense or objection shall be allowed." Thus, in seeking to require a binding statement of claimed value, the district court was seeking to amend the rule, since it agreed that the result should "cut both ways." Its exemption of condemnation cases from the good cause requirement therefore lacks foundation.

C. Discovery is limited to matter relevant to the subject matter of the action. The subject matter of a condemnation case is not any past connections between the parties, such as ordinary civil litigation in tort or contract, but is simply the just compensation payable for this property. On this issue the burden rests upon the condemnee, and the opinions of the owner, lay witnesses, realtors, bankers and professional appraisers may be offered. Thus, "market value" is not a fact peculiarly within the knowledge of any particular person.

In this case, the work of the appraisers has not been accepted and approved by the United States. Indeed, one of the appraisers has not even made his report to the Department of Justice. It cannot be said that the opinions or reasoning of those appraisers will be used at the trial. The mere fact that the Government may have received reports from appraisers it does not

vouch for or present at the trial is not admissible in evidence.

Other materials ordered disclosed are even more clearly irrelevant to the issues at the trial. It is well settled that settlements made as to other parcels have no bearing on just compensation, nor do jury awards for other parcels. It likewise follows that appraisals the deponents may have made of other lands would not be admissible in evidence, nor would their disclosure lead to admissible evidence. Even more remote is the ordered listing of lots not acquired (which is none of the appraisers' business, in any event) and notes made by the appraisers in the course of their investigations. No claim of use of discovery to prevent surprise can be made as to such matters which are inadmissible, as to witnesses, appraisals or reasoning the United States will not present, especially in view of the burden on the landowner to prove the amount of just compensation to which he is entitled. It is hard to see how he could claim surprise as to that issue unless he has failed to carry his burden.

### III

In contrast to the lack of legitimate reason for Meyer to explore other matters ordered by the district court is the unjustified prejudice resulting to the United States and to the appraisers from such probing. The rules authorize the court to protect the party or the witness from annoyance, embarrassment or oppression and to prevent bad faith use of discovery. That authority should have been exercised here.



A. The United States has not approved or accepted, and does not vouch for, the opinions of the persons here examined or the reasoning by which their results were reached. Since no facts of use to Meyer's appraisers were withheld, the only use of the material ordered disclosed would be to attempt to discredit the testimony that might be given at the trial, if it were determined to use these witnesses.

Many perfectly legitimate reasons could result in a conclusion by the attorneys, in protection of the interests of the public represented by the United States, not to present particular opinions. More frequently, consultation and collaboration with respect to applicable federal condemnation principles may well cause appraisers to revise their judgment about various factors involved in reaching their opinions. It is not fair to prejudice the rights of a party—here the United States—by requiring such premature disclosure without an opportunity first to review and approve or disapprove the appraisers' processes. The initial report by an appraiser is simply a foundation upon which his testimony is based after thorough testing by the attorney and revision when necessary. There is even less justification for prejudicing the United States by notes, etc., made by the appraisers, in which the United States has no interest, because the concern is with the validity of the appraisal and the reasons for it, not the false starts or mistaken ideas the appraiser might have entertained sometime during his study.

B. For the same reasons, the discovery, delving into all of the appraiser's procedures and mental

processes in the making of the appraisal, embarrasses the appraiser without just cause. Important in this connection is the fact that appraisers are normally not expert at unambiguous self-expression, so that their reports can withstand the scrutiny of opposing counsel.

An important problem left undecided by the court below was the question of whether the appraiser should receive his usual payment for testifying and, if so, who should pay it. This is especially important, since the examination ordered is unlimited, going far beyond the matters which would be admissible at the trial. To compel the appraiser to testify without receiving his normal fee, or to compel a party other than the one insisting on delving into all of these matters to pay for the expert's time, would seem to be permitting discovery to become an instrument of oppression.

C. In *Hickman v. Taylor*, the Court held that the roughly termed "work product" of the lawyer in preparing his case by assembling information, sifting the relevant from the irrelevant facts, preparing his theories, etc., was not subject to discovery. Since the decision did not rest on the attorney-client relationship, no reason appears why it does not apply to those closely analogous functions of the professional appraiser. He performs similar functions and works in close cooperation with the attorney in preparing for the trial. In important areas these functions merge and cannot be compartmentalized. They should receive equal treatment under the discovery rules.



D. The purposes of the discovery rules will not be served by the unlimited disclosure ordered in this case. One purpose is to narrow and clarify the issues. But here there is only a single issue, i.e., just compensation. The facts have been disclosed. The other materials ordered disclosed here are the opinions and reasoning of the appraisers. Disclosure of these factors does not narrow the issue.

The discovery ordered will prolong, not shorten, the handling of this case. Since the issue ultimately turns largely on the weight to be given the opinions of the experts, the parties are entitled to, and do, show all the considerations upon which their conclusions are based. Consequently, issues such as qualifications of the experts, their understanding of the physical condition of the properties, the sales they relied upon, their opinions of highest and best use of the property, and the other factors they considered cannot be agreed upon, stipulated or eliminated from the case.

Rather than shortening the trial, the depositions here ordered would simply be a preview of the trial in much more lengthy terms because it is not confined to admissible evidence and is not taken in the presence of the judge who can limit time-wasting excursions into irrelevant or prejudicial matter.

#### IV

This Court has held more than once that, when a declaration of taking is filed, title vests in the United States and the courts have no jurisdiction to revest that title by dismissing the proceedings. *United States v. Cobb*, 328 F. 2d 115 (C.A. 9, 1964), and

cases cited. Rule 71A, F.R.Civ.P., which made the federal rules applicable to condemnation proceedings, was not designed to amend or modify the Declaration of Taking Act. Thus, although other remedies might be available for failure of the United States to turn over the appraisers' files, etc., the order of dismissal was not authorized.

## ARGUMENT

### I

#### **The Federal Discovery Rules Do Not Accord a Party a Right to Compel Revelation of Everything He Would Like to Know From His Opponent or Possible Witnesses**

The federal rules of depositions and discovery (Rules 26-37) were designed to provide "notice-giving, issue-formulation and fact-revelation" theretofore inadequately performed by pleadings. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).<sup>3</sup> The rules "create integrated procedural devices" (*Hickman*, p. 505), are to be accorded a broad and liberal treatment, and (*Hickman*, pp. 507-508):

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the *facts* underlying his opponent's case. Mutual knowledge of all the relevant *facts* gathered by both parties is essential to proper litigation. To that end, either party may com-

---

<sup>3</sup> Because of the many citations of *Hickman* herein, it will be referred to simply as "*Hickman*," followed by the inter-page citation.

pel the other to disgorge whatever *facts* he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. *But discovery, like all matters of procedure, has ultimate and necessary boundaries.* As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege. (Emphasis supplied.)

Shortly later *Hickman* continued (p. 509):

Fortenbaugh was to submit any memoranda he had made of the oral statements so that the court might determine what portions should be revealed to petitioner. All of this was ordered without any showing by petitioner, or any requirement that he make a proper showing, of the necessity for the production of any of this material or any demonstration that denial of production would cause hardship or injustice. The court simply ordered production on the theory that the facts sought were material and were not privileged as constituting attorney-client communications.

More recently, the Supreme Court has emphasized the limitations on discovery in Rule 26(b) that the matter must be relevant to the subject of the pro-

ceeding; in Rule 30(b) that the court should prevent use of discovery devices in bad faith or to produce "undue annoyance, embarrassment or oppression;" and in Rules 34 and 35 that the movant must demonstrate "good cause." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). *Schlagenhauf* declared (p. 121) that "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations," and held that mental and physical examinations could not "be ordered routinely in automobile accident cases" (p. 122). The Court also said that (p. 118): "Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation of that Rule," that the "ability of the movant to obtain the desired information by other means is also relevant" and (fn. 16) criticized the order of examination in "very broad, general areas." While dissenting because he thought good cause was shown, Justice Black agreed (p. 124) that "the order was broader than required."

The rulings below plainly violate these basic concepts of the discovery rules and would create an unlimited right to discovery of all notes, mental processes, etc., of appraisers in condemnation cases whose results or processes have not been approved by the party, here the United States, without any showing of justification therefor. This case goes even beyond the ruling which was reversed in *Hickman*, since we are dealing primarily with opinion, not fact, and much of the material ordered disclosed could not possibly be admissible in evidence or lead to admissible evidence and could only be used to produce injustice,



embarrassment to the public interest, and annoyance and oppression of the deponents.

These Supreme Court decisions, of themselves, we submit, compel reversal of the judgment. We shall now discuss the rules, and the decided federal condemnation cases which, we submit, justified the refusal to disclose, on the facts of this case, those materials which were withheld.

## II

### Ground for Discovery of the Materials Refused Was Not Shown by Appellee

A. *Purely factual data was not refused.*—Although no showing was made that the material sought, or similar material, was not equally available to Meyer (indeed, perhaps more readily, since he was the owner of the property), purely factual matters, such as maps, photographs and the like, were supplied. As we have listed in the Statement, *supra*, the materials refused were the opinions of the deponents, independent appraisers, which had not been approved and accepted by the Department of Justice, and the reasoning process that they had gone through, including all the notes they had made, or matters clearly inadmissible as evidence.

B. *No good cause was shown for requiring discovery of the matters refused.*—This case presents a situation where both Rules 26 and 34, F.R.Civ.P., were presumably invoked. The deponents were not regular government employees. They were hired under contract to perform this task for the Government.

Hence, their testimony was under Rule 26, making applicable Rule 30(b) empowering the court to limit such examination. Rule 34 requires any party "upon showing good cause therefor" and "subject to the provisions of Rule 30(b)" to produce documents "relating to any of the matters within the scope of an examination permitted by Rule 26(b)." *Hickman*, at page 512, holds that a showing similar to good cause may be required to overcome limitations upon depositions. Thus, the present issue is substantially the same, whether the oral deposition or production of the files is concerned.

There is nothing in the rules or the decisions to justify the notion of the court below (R. 109-110) that condemnation cases are an exception to the requirement of showing good cause.<sup>4</sup> As the Court said in *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964): "The courts of appeals in other cases have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. This is obviously true as to the 'in controversy' and 'good cause' requirements of Rule 35." In this connection, the district court emphasizes its view that the parties should reveal their claims of value prior to trial, apparently in a binding form. This is contrary to Rule 71A. No pleading of the claims of value is provided

---

<sup>4</sup> See *United States v. 6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195, 196-197 (N.M. 1955); *Continental Distillery Corp. v. Humphrey*, 17 F.R.D. 237, 241 (D.C. 1955); 4 Moore, *Federal Practice* (2d ed. 1963) sec. 34.02(2), pp. 2425-2426.



for. No such allegation is required in the complaint and, although a defendant waives other defenses by failure to answer, "at the trial of the issue of just compensation, whether or not he has previously appeared or answered he may present evidence as to the amount of just compensation to be paid for his property \* \* \*." Rule 71A(e). Thus, the condemnee may not be restricted as to presentation of evidence by discovery rulings. The district court was either suggesting amendment to Rule 71A or uneven application of the rules when it reasoned that the discovery "goes on further than the pleading requirements of Rule 8" (R. 111; see also R. 112).<sup>5</sup> It should be remembered also that (*Evans v. United States*, 326 F.2d 827, 830 (C.A. 8, 1964)):

The deposit of estimated compensation by the government is "no evidence of value" and has "no bearing whatsoever on value." *Chapman v. United States*, 10 Cir., 1948, 169 F.2d 641, 644. See, also, *In re United States*, 5 Cir., 1958, 257 F.2d 844, 849, certiorari denied, *Certain Interests in Property, etc. v. United States*, 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 228; *United States v. 9.85 Acres in Hampton, Virginia, E.D. Va.*, 1959, 183 F.Supp. 402, 404-405, affirmed sub nom. *Tidewater Development & Sales Corp. v. United States*, 4 Cir., 1960, 279 F.2d 890. Nor, for that matter, does the deposit of estimat-

---

<sup>5</sup> The court said (R. 111): "It goes without saying, however, that the allowance of discovery in these matters must cut both ways." In view of Rule 71A(e), how can the United States compel the condemnee to state his claim of value?

ed compensation by the government establish a minimum for an award. This has been conclusively determined by the Supreme Court in *United States v. Miller*, 1943, 317 U.S. 369, 381, 382, 63 S.Ct. 276, 283, 284, 87 L.Ed. 336: \* \* \*.

The reasons given by the district court are thus insufficient to justify judicial creation of an exemption from the good-cause requirement of discovery in condemnation cases. This lack of good cause was given as the ground for denial of discovery of appraisal matters in condemnation cases in *United States v. Certain Parcels of Land in San Francisco*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States v. Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (S.D. Cal. 1954); *United States v. 6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195 (D. N.Mex. 1955); *United States v. 4.724 Acres of Land in Plaquemines Parish*, 31 F.R.D. 290 (E.D. La. 1962); *United States v. 284,392 Square Feet of Floor Space, Etc.*, 203 F.Supp. 75 (E.D. N.Y. 1962).

C. *The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case.*—Rule 26(b) limits oral examination to matter “which is relevant to the subject matter involved in the pending action.” The rule ties relevancy to the pleadings by continuing “whether it relates to the claim or defense of the examining party or to the claim or defense of any other party.” Rule 34 incorporates this limitation. The last sentence of Rule 26(b) illustrates the mean-

ing of "relevant" by providing "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." On the other hand, *Hickman*, p. 508, emphasized the function of the court to prevent delving into irrelevant matter, and the Notes of the Advisory Committee, explaining the amendment adding the last sentence, said: "Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry \* \* \*." See Note, 28 U.S.C.A., Rule 26(b), p. 290.

A condemnation case does not involve resolution of claims or defenses resulting from past transactions or occurrences between the parties, as in the case of normal civil litigation, such as tort cases, contract claims, and the like. No pleadings as to the amount of just compensation are provided for (*supra*, p. 32) and, although the United States is the plaintiff, the burden of proof on this issue is on the landowner. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943); *Wilson v. United States*, 350 F.2d 901 (C.A. 10, 1965); *United States v. Glanat Realty Corp.*, 276 F.2d 264, 266 (C.A. 2, 1960); *United States v. Certain Parcels of Land in Rapides Parish*, 149 F.2d 81 (C.A. 5, 1945).

The "subject matter" under Rule 26 is the amount of just compensation which, under federal principles, is the fair market value at the date of taking. *United States v. Miller*, 317 U.S. 369 (1943). For real estate, which rarely has an active daily market, "the

application of this concept involves, at best, a guess by informed persons" (*Id.*, p. 375). It follows that market value is not a fact peculiarly within the knowledge of any person or any particular group of persons. Many different types of persons are permitted to express opinions of value, such as landowners, lay witnesses from the vicinity, local real estate dealers or brokers, and expert appraisers, e.g., *Ruud v. United States*, 256 F.2d 460 (C.A. 9, 1958). In *United States v. 60.14 Acres of Land in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1966), the court said (p. 668):

All opinion evidence of market value is to some extent inherently speculative (see *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); *United States v. Miller*, 317 U.S. 369, 374-375, 63 S.Ct. 276, 87 L.Ed. 336 (1943)), for it seeks to describe in the form of a realistic event what is a theoretical construction,—something which in fact did not occur.

The mere fact of employment of appraisers and their rendering of reports in this case does not mean any admissible evidence can be discovered by examination of the appraisers and their files.<sup>6</sup> The United States has not reviewed, approved or endorsed the results of the appraisals. It has not examined the reports or the adequacy of the reasons for the results, and has not satisfied itself with regard to their valid-

---

<sup>6</sup> Discovery was sought even of incomplete appraisals made as to other lands presumably not yet in condemnation and as to any appraisal of the Meyer property not yet completed.



ity in law or fact. As the Assistant United States Attorney pointed out (R. 29), no decision has been reached as to whether these appraisers will be used at all at the trial. And Mr. Wilson testified that his appraisal for the Department of Justice had not been completed (W. Tr. 48-49). We detail later the reasons why it is highly prejudicial and unjust to the United States and to the appraisers to turn those tentative appraisals over to the exacting scrutiny of hostile opposing counsel. Our present point is that no reason can be given to justify discovery of opinions of persons who will not testify to value at the trial. In *United States v. Certain Parcels of Land, Etc.*, 15 F.R.D. 224, 233 (S.D. Cal. 1954), the court said: "It must be noted, however, the opinions are and will remain wholly incompetent and immaterial as evidence unless and until the appraisers are called as witnesses upon the trial and are shown to be experts qualified and prepared to give competent opinion testimony as to the value of the property in controversy." Speaking of experts who were not called by the Government as witnesses at the trial, the court, in *Dicker v. United States*, 352 F.2d 455 (C.A. D.C. 1965), cert. den., 383 U.S. 936, which found it unnecessary to pass on the correctness of the district court's refusal of discovery of these appraisers' reports, said (p. 457) :

That the Government consulted them but did not use their opinions is not relevant evidence of value; Appellants could not show the prior consultation in order to bolster the witnesses'

credibility, nor could they seek to arouse jury prejudices by showing the prior consultation under the guise of proving the experts' qualifications. If Appellants wanted more expert testimony on value it was for them to produce such evidence.

As indicated, even if the United States decided to call the appraisers, they might be held not to be qualified, e.g., *United States v. Johnson*, 285 F.2d 35 (C.A. 9, 1960); *United States v. 60.14 Acres of Land in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1966), and, again, the opinions of those experts and the reasons for them are completely irrelevant to the issue in the case.

Other materials ordered delivered are even more remote from the issue in the case. Pursuant to the policy of the law to encourage settlements and to avoid collateral issues, the amount paid for other parcels as the result of settlements or condemnation awards is not admissible in evidence at the trial of a particular parcel. "It seems too obvious for argument that another jury estimate from the evidence submitted to it would have no probative value in this case." *Justice v. United States*, 145 F.2d 110, 111 (C.A. 9, 1944). In affirming the exclusion of the prices paid by the United States in settlement of condemnation proceedings, the court, in *United States v. 13,255.53 Acres of Land in Burlington and Ocean Counties*, 158 F.2d 874, 877 (C.A. 3, 1946), declared: "Testimony of the price paid by the condemnor for other tracts is not admissible." And *Slattery Company v. United States*, 231 F.2d 37, 41 (C.A. 5,



1956), agreed, saying: "This rule, based upon the view that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value, is the generally prevailing rule in this circuit and elsewhere." See, as to settlements generally, *Home Ins. Co. v. Balt. Warehouse Co.*, 93 U.S. 527, 548 (1876).

Thus, the discovery here ordered (*supra*, p. 10) as to settlements and payments made in other cases could not possibly lead to admissible evidence and would violate the policy of encouraging settlements by preventing their use to the prejudice of the parties making the settlements or payments. And again, since the issue of the case is the value of the property involved at the date of taking, a list of lots which have not been acquired (the decision as to acquisition being no business of the appraisers), appraisals of other properties, appraisals of the same property 10 years earlier, and incomplete appraisals of other properties (*supra*, pp. 10, 15, 18) have, we submit, no relevancy to the issue of value in this case and were inadmissible. The various notes the appraisers made in the course of their investigations are again remote from the issue in the case, which is the just compensation payable for the property. The same is true as to comparable sales rejected.

The theory that discovery may be used to prevent surprise does not support the explorations ordered by the district court. Certainly as to inadmissible evidence or as to matters rejected by the appraisers, Meyer will not be surprised. Since he is the land-

owner and has the burden of proof as to just compensation, he could be surprised by elements relevant to that issue only to the extent that he has not undertaken to carry his burden of proof. The comment of Justice Jackson concurring in *Hickman* is appropriate here (329 U.S. at p. 516):

Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

Again the claim of "surprise" certainly cannot be made as to witnesses the United States does not offer or as to reasoning the witnesses do not use. Under these circumstances, the only "surprise" could consist of not knowing exactly what every witness would testify to prior to the trial, i.e., that the case has not yet been tried. The discovery rules were clearly not intended to provide a dry run of a trial so that any possible mistakes of judgment or otherwise can be avoided.

In this point we have shown that the landowner failed to establish affirmative basis under the discovery rules of need to prowl through the appraisers'

files with regard to the irrelevant material which was refused, and pick their brains as to matters they discarded, etc., especially when the United States has not endorsed their reasoning or conclusions. We now turn to the other side of the coin to show the injustice to the public and to the appraisers which results from failure to apply the protective provisions of the discovery rules in cases like this one.

### III

#### The Protective Provisions of the Discovery Rules Should Preclude the Unlimited Discovery Sought by Appellee

When the United States sought a protective order, the district court denied it completely without limiting discovery in any way except for some undefined provision for paying the appraisers for their time (R. 112). When the depositions were taken, appellee's counsel demanded everything, including broad oral examination of the appraisers (see *supra*, pp. 15-16). In issuing the contempt order, the district court did not indicate any thought that this position was more far-reaching than it contemplated. We submit that the court should have exercised its authority under Rule 30(b) and (d) "to protect the party or witness from annoyance, embarrassment or oppression" and to prevent bad faith use of the discovery procedures.<sup>7</sup>

---

<sup>7</sup> In *Schlagenhauf*, the Court said (379 U.S. at p. 121, fn. 16): "Moreover, it seems clear that there was no compliance with Rule 35's requirement that the trial judge delineate the 'conditions, and scope' of the examinations. Here the examinations were ordered in very broad, general areas."

A. *The discovery here sought was unjust to the public.*—A basic rule in federal condemnation which unfortunately seems often to be forgotten is that “it is the duty of the State, in the conduct of the inquest by which compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.” *Searl v. School District, Lake County*, 133 U.S. 553, 562 (1890).

Neither the opinions of value, the reasoning by which they were reached, nor any other of the matters refused have been accepted, approved or vouched for by the United States. We are not here concerned with concealment of any facts needed by appellee for his appraisers to prepare their opinions or claims. The only possible use, in connection with the trial of this case, that appellee could make of the materials he seeks would be to discredit the appraisals or to secure the admission, by indirection, of evidence which is not admissible in federal condemnation trials. It would, we submit, be unfair to prejudice the public interest by permitting such collateral matters, unapproved and not vouched for by the Government, to affect the amount of just compensation.

Valuation in condemnation is a complex appraisal-legal problem, where fair presentation of each party's case requires close cooperative effort between the appraiser and the trial attorney. The district court suggested the theory that the appraiser is non-partisan and is not to be influenced by the lawyer who hires him (R. 111-112). Judge Murrah said in



*United States v. Chapman*, 158 F.2d 417 (C.A. 10, 1946), in reversing a condemnation case where a juror (Tomlinson) had appeared as an expert witness for the condemnee in an earlier case (p. 421):

Tomlinson appeared as a witness in the Surber condemnation proceedings not to give facts, but to express an opinion as an expert on values. This of course is not only acceptable and desirable, but essential to a decision on the vital issue in the case. But, no one would be so naive as to believe that an opinionated witness is free from bias on the side of the issues he supports.

The literally hundreds of appellate decisions in federal condemnation cases, showing the divergence of opinion of the experts on the two sides of such cases, confirm this fact. An attorney who presented the evidence of an expert for whom he did not vouch would be derelict in his duty to his client and to the court.

Since value is not an absolute fact, there are bound to be divergences of opinion. And, for many reasons, a few of which we will outline, the fact is that the original report from the appraiser is no more than an initial beginning from which his final testimony is fashioned in conjunction with the lawyer. Because of the need for review of appraisals, there is in the Land and Natural Resources Division of the Department of Justice a section designated the "Appraisal Section," which reviews the appraisals submitted by those who have been hired. The appraisals are also reviewed by the attorney who will try the case and often by an attorney in the Department. The result

of these reviews is often a decision not to present the testimony of particular appraisers or, more frequently, revision of their reasoning, supplementation of data, and possible change of opinion, primarily because of the difference between federal condemnation principles and applied by many states. Because of the requirements of supervision, of consistency of position, and of preservation of the policy of fairness, both to the public interest and to the landowner, in the handling of some 20,000 cases (tracts) annually, the United States must use procedures more elaborate than do landowners. However, essentially the same process of attorney-appraiser collaboration is employed by any experienced attorney for a condemnee.

One of the perfectly legitimate causes for rejection or revision of the initial appraisal is the difference between federal and state law. Local appraisers with experience under their own law often need correction in this regard which may result in a different final result. The difference is not obvious or simple to ascertain. For example, in many states, such as Pennsylvania, the basic term "market value" has a meaning different from the federal market value standard. *United States v. 60.14 Acres in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1965); *United States v. Certain Parcels in Philadelphia (Wainwright)*, 130 F.2d 782 (C.A. 3, 1942). The fact that many states award compensation when property is damaged, contrary to the federal rule (*Batten v. United States*, 306 F.2d 580 (C.A. 10, 1962), cert. den., 371 U.S. 955), often requires the revision of appraisals to exclude particular elements



considered. Again, the federal rules as to set-off of benefits is not limited by the arbitrary rule of many states that no set-off may be made against the value of the land taken but only against severance damage.

Other inadequacies or errors of appraisals revealed by review include failure of comparable sales cited to support the result; inadequacy of the report as to comparable sales; use of a reproduction process in an inappropriate case; capitalization of projected future income, especially when it is not reduced to a present cash value (the federal standard); failure to understand the nature of the interest to be valued, especially in easement takings; and separate valuation of elements, rather than value as a whole. These are only a few examples of the many reasons that revision of the initial appraisals may perfectly legitimately be required. This is not to suggest that appraisers are incompetent or make an unreasonable number of mistakes. No one is perfect, and review and correction of almost everyone is at times required. One analogy is the review of trial courts by courts of appeals. The increasing volume of work, which affects appraisers as much as any other area of endeavor today, makes it more likely that particular matters will be overlooked or not completely done. As in other areas today, completeness and correctness war with the volume of work to be done.

To permit the discovery and use by hostile counsel of these initial, unapproved appraisals would, we submit, be unjust to the public. Analogous is Mr. Justice Jackson's comment in concurring in *Hickman* (pp. 517-518):

And what is the lawyer to do who has interviewed one whom he believes to be a biased, lying or hostile witness to get his unfavorable statements and know what to meet? He must record and deliver such statements even though he would not vouch for the credibility of the witness by calling him. Perhaps the other side would not want to call him either, but the attorney is open to the charge of suppressing evidence at the trial if he fails to call such a hostile witness even though he never regarded him as reliable or truthful.

Is it fair to prejudice the United States with an appraisal which it does not accept or approve? Is the United States concealing evidence when it rejects an opinion it believes is unsupportable or wrongly founded?

The other material in the appraisers' files which Meyer sought was even more plainly prejudicial. It is the validity of the final appraisal with which the United States is concerned and not with the notes, mistaken approaches, etc., which may have been made in the earlier stages of the appraisal. The United States would have no occasion to examine and approve or disapprove of the appraisers' files. They have nothing to do with the issue in the case and should not, we submit, be the subject of discovery.

The fact is that there was neither necessity nor justification for the discovery the court ordered. The basic purposes of the discovery rules would not be served thereby. Hence, it would be, we submit, "oppression" within the meaning of Rule 30(b) to require the United States to expend the time of its at-

torneys and the money required to appear at such deposition proceedings.<sup>8</sup>

B. *The discovery here sought would annoy and embarrass the appraisers.*—The annoyance and embarrassment to the appraisers if they are compelled to turn over their entire personal files to hostile counsel are obvious. Here again, the fact that the initial appraisal may be modified in many ways, after review and consultation with trial counsel, is important. At the trial, only the appraiser's opinion, as then expressed, and the reasons for it are germane to the issue—just compensation. His preliminary notations have no relevancy and should not be discoverable. The reasons why it is unfair to the United States to require disclosure of unreviewed and unapproved appraisals also demonstrate unjustified embarrassment to the appraiser which will result from such disclosure.

Also important here is the fact that appraisers may not express themselves with complete precision. Any lawyer knows the difficulties of expressing thoughts in unambiguous and unmistakable language, especially in those papers which must meet the critical eye of the opposing counsel. Justice Jackson's comments in *Hickman*, as to the discovery from the

---

<sup>8</sup> The impression is apparently widespread that the Department of Justice has unlimited funds and personnel available and, hence, such considerations are unimportant. This is not the fact and any diversion of such time and money to unnecessary activities impedes and delays the conduct of other cases, condemnation or otherwise, to which the United States is a party.

lawyer, apply with even greater force to the appraiser who is not skilled in unambiguous self-expression. The statement is (329 U.S. at pp. 516-517):

The real purpose and the probable effect of the practice ordered by the district court would be to put trials on a level even lower than a "battle of wits." I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences. Everyone who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps



against that of his chief witness, or possibly even his client.

A problem which has bothered many courts, but which was simply left up in the air by the court below, concerns payment to the appraiser. The interests of three parties are concerned. In giving the testimony in response to the discovery order, the appraiser is performing his professional function and should be paid accordingly.<sup>9</sup> He should receive his regular fee for testifying and not merely that of a witness who, for example, has observed an accident. Since he is performing his ordinary professional duty, that fee should not be subject to the discretion of the court, any more than is his fee for testifying at the trial. In view of the unlimited examination without regard to relevancy or admissibility, the testimony ordered by the court below at the preliminary trial will, in terms of time, probably be much more important to the appraiser than the trial itself.

Although some courts have suggested splitting of the fees between the parties, no reason appears why the party who insists in delving into all of the appraiser's activities and his mental processes should not bear that expense. The discovery could truly become a means of oppression within the meaning of Rule 30(b) and (d), if the objecting party is compelled to pay part of the fee and if, in the absence of the court, the attorney is permitted, as sought here,

---

<sup>9</sup> It has been held that the very fact that the appraiser is a professional employed by one party precludes discovery. *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952).

to explore every sale rejected, every other appraisal made and all other such matters.

C. The “work product” principle of *Hickman v. Taylor*, 329 U.S. 495 (1947), should preclude the discovery here sought.—The term “work product” was used in *Hickman* by the court of appeals to describe the various materials collected in an attorney’s file in the process of preparing his case. The Supreme Court said (pp. 510-511):

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.



An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Hickman* specifically rejected the attorney-client privilege as the ground for refusal of discovery (p. 508). No reason appears why *Hickman* should be confined to attorneys, rather than applied to other persons whose functions are similar. Much of the reasoning above applies to an appraiser who, while not an advocate, should be free to go about his way ascertaining the facts, investigating sales, interviewing parties to the sales or other persons in the vicinity, rejecting irrelevant facts, preparing his valuation theories, etc. As in the case of the attorney, this work is reflected in notes of personal impressions, tentative conclusions reached, etc. But here, appellees' counsel said (*supra*, p. 16): "I would want to go into the reason why he either used it or didn't use it [a particular comparable sale]." Thus, going beyond the written materials sought in *Hickman*, this case throws wide open the door to everything the appraiser did.

As we have noted, the appraiser and attorney must work together to produce the final result. Their functions, while separate in some particulars, merge in important areas and their efforts cannot be compartmentalized. The attorney's file resulting from

these efforts is not the subject of discovery. Why should the appraiser have less protection? He, like the attorney, is performing a professional function of importance in the field of just compensation. For these reasons, we think that the *Hickman* rule applies to condemnation appraisals. See, e.g., *United States v. Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953). Other courts have expressed the same idea in saying that "Yet, not every document is, *ipso facto*, discoverable. *Hickman v. Taylor* \* \* \*. One of the lines of limitation, which federal courts have drawn, relates to the discovery of opinionative material." *United States v. Certain Parcels of Land in San Francisco*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States v. 4.724 Acres in Plaquemines Parish*, 31 F.R.D. 290 (E.D. La. 1962); *United States v. 7,534.04 Acres in Bartow and Cherokee Counties*, 18 F.R.D. 146 (N.D. Ga. 1954); *United States v. 284,-392 Square Feet of Floor Space, Etc.*, 203 F.Supp. 75 (E.D. N.Y. 1962).

The court below has simply held that *Hickman* does not apply to condemnation cases (R. 109-110). Like the court's holding (discussed *supra*, pp. 31-33) that the "good cause" limitation does not apply to condemnation cases, this distinction is unsupportable.<sup>10</sup>

---

<sup>10</sup> The quotation (R. 109) from Friendenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stanford L.Rev. 455, 472-473, has no relevancy to initial appraisal reports in condemnation cases which, as here, have not been approved and accepted for trial purposes and does not apply to appraisers who, like the attorney, are weighing the value of certain evidence, i.e., the bearing various factors have on his opinion of value.

D. *The purposes of the discovery rules will not be served by the discovery here ordered.*—One objective of the discovery rules is to “narrow and clarify the basic issues between the parties.” *Hickman*, p. 501. No such function is served by discovery of expert opinions in condemnation cases. There is only a single issue—the amount of just compensation. *McCandless v. United States*, 298 U.S. 342, 348 (1936). It is only those cases where there is substantial divergence in the position of the parties that come to trial. The fact is that more land needed for federal purposes is acquired by voluntary purchase than by condemnation. And of the cases embraced in condemnation proceedings, only a small percentage is actually tried.

The basic issue of just compensation cannot be narrowed. The facts were disclosed. The other materials relating to the opinion and reasoning of the experts are simply the factors relevant to that conclusion. The objective of each trial attorney is to present a persuasive case to the jury and demonstrate that his experts gave thorough consideration to all relevant factors. Consequently, the competent attorney will not stipulate to a factor so as to eliminate its consideration in detail. For example, on the threshold question of qualifications of the experts, the parties are entitled to and do outline the qualifications, even though their opponents do not claim they are unqualified. Another example is the fact that, even though there is frequently agreement as to the physical nature and condition of the property, each

expert describes such features to demonstrate the thoroughness of his investigation and the correctness of his understanding of the facts to demonstrate the soundness of his opinion. So also, in most cases comparable sales evidence is offered, not as direct evidence of value, but as factors considered by the experts in reaching their conclusions for the purpose of judging the weight to be given their testimony. See, e.g., *United States v. Johnson*, 285 F.2d 35 (C.A. 9, 1960). This is not cumulative evidence since, for the credibility of the experts, it is their understanding of such facts, as much as the facts themselves, that is important in the condemnation trial. As the court put it in *United States v. 25.406 Acres of Land in Arlington County, Va.*, 172 F.2d 990, 993 (C.A. 4, 1949) :

Testimony as to value would be worth little or nothing, if witnesses were not allowed to explain to the jury their qualifications as experts and the reasoning by which they have arrived at the expert opinion to which they testify; and the rule is that they may thus give the grounds of their opinions. Wigmore on Evidence 2d Ed. sec. 562; Lewis, Eminent Domain 3d Ed. sec. 654.

For the same reasons, discovery such as has been ordered in this case will extend, not shorten, the handling of the case. Counsel sought, and the court has authorized, in effect what might be called a preliminary trial far more extensive than the actual trial, because it is proposed, without any limitation by the court, to pursue many matters which would be ex-



cluded at the trial (*supra*, pp. 37-38). Counsel said (*supra*, pp. 15-16): "I desire to go into each any every one of them [possible comparable sales] that he had used and that he has investigated and decided not to use, I would want to go into the reason why he either used it or didn't use it." In the normal process, the professional appraiser will investigate all sales, catalogue, for example, as many as 150 of them and then find those most comparable to the lands involved. Cf. *United States v. 60.14 Acres in Warren and McKean Counties*, 362 F.2d 660 (C.A. 3, 1965). As we have noted, this extensive, preliminary examination will have little, if any, likelihood of reducing the length of the jury trial. On the contrary, it would undoubtedly produce additional collateral matters in an attempt by counsel to show at the trial that the witness was departing from what he said at the discovery proceedings. Compare Mr. Justice Jackson's comments in *Hickman* quoted *supra*, p. 47. Why else does counsel want to discover such matters? Certainly he does not want to find out about these sales so as to tell his own appraiser about them. That appraiser's testimony would be of little weight if he said "I found out about my sales from the testimony of the government appraiser."

In *Lewis v. United Air Lines Transport Corporation*, 32 F.Supp. 21 (W.D. Pa. 1940), the court said (p. 23):

To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a consid-

erable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

See also *United States v. Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States v. 6.82 Acres of Land in Bernalillo County*, 18 F.R.D. 195 (D. N.M. 1955); *United States v. 900.57 Acres in Johnson and Logan Counties*, 30 F.R.D. 512, 520 (W.D. Ark. 1962).

In addition, when, as here, a deposit has been made, Rule 71A(j) provides that "In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited *and for the ascertainment and payment of just compensation.*" (Emphasis supplied.) To impose the burden of the discovery here ordered upon the normal delays and expenses caused by the volume of condemnation cases would be unwarranted, contrary to the purposes of the federal rules, and would serve no legitimate purpose of the discovery rules. The practicalities of the situation are well described in *United States v. 900.57 Acres in Johnson and Logan Counties*, 30 F.R.D. 512, 521 (W.D. Ark. 1962), as follows:



During the last 20 years thousands of tracts of land have been acquired by the Government through the court for the Western District of Arkansas. This is the first instance in which a landowner has filed interrogatories or has sought to obtain appraisal reports. In practically every controversy between the Government and the landowner as to just compensation, both sides have adduced testimony to establish any and all facts which might be relevant in ascertaining just compensation. Almost without exception, a witness testifying to such facts concludes his testimony by stating his opinion as to the market value, and in that manner justice is done to the Government and to the landowner. It would be an innovation and greatly prolong the trial at the expense of the parties were the court to fail to sustain the objections of the plaintiff to the interrogatories and to the motion for production of documents. In fact, as suggested by Judge Sanborn, such a holding would entirely divorce practical common sense from the trial and lead to rank injustice to either the Government or the landowner.

#### IV

**In Any Event, the District Court Had No Jurisdiction to Set Aside the Declaration of Taking and Dismiss the Proceeding**

"This court has held in *United States v. Carey*, 9 Cir., 143 F.2d 445, 450, and in *United States v. Hayes*, 9 Cir., 172 F.2d 677, 679, that when a declaration of taking is filed and deposit is made, title vests in the United States and the district court is

powerless to dismiss the proceedings. In accord is *United States v. 2,974.49 Acres*, 4 Cir., 308 F.2d 641." *United States v. Cobb*, 328 F.2d 115, 116 (C.A. 9, 1964). This Court further pointed out (p. 117): "Of course, it is elementary that the Government could take the property without any deposit and leave the owner to his remedy in the Court of Claims under the Tucker Act. *United States v. Dow*, 357 U.S. 17, 21, \* \* \*."

So here, the judgment setting aside the declaration of taking and dismissing the proceedings was, we submit, plainly beyond the jurisdiction of the district court. It is no answer to say that the federal discovery rules (Rule 37(b)) authorize such action. Without regard to what other such sanction may be applied in condemnation cases for failure to discover, we submit that the judgment entered below cannot be sustained. In *Carey, supra*, this Court held that such action could not be taken for alleged lack of prosecution.

The adoption of Rule 71A did not enlarge the powers of the court. This would seem to be a matter of substance, i.e., vesting of title in the United States, and, hence, beyond the reach of procedural rules. Cf. *United States v. Sherwood*, 312 U.S. 584 (1941). In any event, the rulemakers specifically denied an intent to amend the Declaration of Taking Act by Rule 71A. The notes refer to that Act and say (28 U.S.C. Rule 71A, p. 387): "Rule 71A is not intended to and does not supersede the Act of February 26, 1931, c. 307, §§ 1-5 (46 Stat. 1421), 40 U.S.C.A. § 258a-258e \* \* \*" and Rule 71A(a) provides that the other

rules “govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.” Some of the other sanctions of Rule 37(b) also cannot apply to condemnation cases as regards the issue of just compensation. No pleadings are provided for on the issue; hence, an order cannot be entered under Rule 37(b) (2) (ii) refusing to allow a party to support or oppose designated claims or defenses or entering judgment by default under Rule 37(b) (2) (iii). These considerations simply add emphasis to the fact that the opinions and reasoning of expert appraisers or other possible witnesses as to value are not, at least in the preliminary stages prior to review and approval, within the objectives and purposes of the discovery rules.

## CONCLUSION

It is submitted that the judgment below should be reversed.

Respectfully submitted,

EDWIN L. WEISL, JR.,  
*Assistant Attorney General.*

CECIL F. POOLE,  
*United States Attorney,  
San Francisco, California, 94102.*

A. LAWRENCE BURBANK,  
*Assistant United States Attorney,  
San Francisco, California, 94102.*

ROGER P. MARQUIS,  
*Attorney, Department of Justice,  
Washington, D. C., 20530.*

DECEMBER 1966

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

ROGER P. MARQUIS,  
*Attorney, Department of Justice,  
Washington, D. C., 20530.*



No. 21,127

IN THE

United States Court of Appeals  
For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellant,*

VS.

HORACE MEYER, et al.,

*Appellees.*

Appeal from the United States District Court for the  
Northern District of California,  
Northern Division

BRIEF FOR HORACE MEYER, APPELLEE

C. RAY ROBINSON,

19th and N Street Building,  
Merced, California 95340,

BLEDSON, SMITH, CATHCART,

JOHNSON & ROGERS,

650 California Street,  
San Francisco, California 94108,

*Attorneys for Appellee*

*Horace Meyer.*

ROBERT A. SELIGSON,

650 California Street,  
San Francisco, California 94108,

*Of Counsel.*

FILED

FEB 24 1967

WM. B. LUCK, CLERK

FEB 29 1967





## Subject Index

---

	Page
Statement of the case .....	1
Statement of facts .....	2
Argument .....	12
I. The District Court properly held that the defendant was entitled to discovery of the opinions of the plaintiff's appraisers, the facts upon which they based their opinions and the reports which the appraisers submitted to the National Park Service; and that the United States had willfully failed to comply with the court's order .....	12
II. The Government willfully refused to obey the court's order regarding discovery in the instant case. It willfully and without substantial justification or adequate excuse caused witnesses to disobey subpoenas duces tecum. The District Court had the power and properly exercised its discretion in dismissing the action and setting aside its order for delivery of possession .....	40
Conclusion .....	44

---

## Table of Authorities Cited

---

Cases	Pages
Bergstrom Paper Co. v. Continental Ins. Co. of City of N.Y., 7 F. R. D. 548 (1947) .....	19
Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F. R. D. 347 (1958) .....	19, 28
Buffington v. Wood, 351 F.2d 292 (3rd Cir., 1965) .....	41
Conway Import Co. v. United States, 40 F. R. D. 5 (1966) ..	42
Craig v. Far West Engineering Co., 265 F.2d 251 (9th Cir., 1959), cert. den. 361 U.S. 816 .....	41
Greyhound Corp. v. Superior Court, 56 Cal.2d 355 (1961) ..	15, 27
Henlopen Hotel Corp. v. Aetna Ins. Co., 33 F. R. D. 306 (1963) .....	33
Hickman v. Taylor, 329 U.S. 495 (1947) ...	13, 15, 21, 24, 27, 34, 40

	Pages
Leding v. U.S. Rubber Co., 23 F. R. D. 220 (1959).....	19
Lewis v. United Air Lines Transport Corp., 32 F. Supp. 21 (1940) .....	34, 35
Martin v. Reynolds Metal Corp., 297 F.2d 49 (9th Cir., 1961) .....	27, 28
Oceanside Union School Dist. v. Superior Court, 58 Cal.2d 180 (1962) .....	17
People ex rel. Dept. of Public Works v. Donovan, 57 Cal.2d 346 (1962) .....	26
Russo v. Merck & Co., 21 F. R. D. 237 (1957).....	19
S. F. Unified School Dist. v. Superior Court, 55 Cal.2d 451 (1961) .....	24
Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir., 1948) .....	19
San Diego Professional Assn. v. Superior Court, 58 Cal.2d 194 (1962) .....	24
Seven-Up Bottling Co., Inc. v. United States, 39 F. R. D. 1 (1966) .....	19
Shenker v. United States, 25 F. R. D. 96 (1960) .....	42
Timken Roller Bearing Co. v. United States, 38 F. R. D. 57 (1964) .....	42
United States v. Certain Parcels of Land, 15 F. R. D. 224 (1954) .....	36, 37, 42
United States v. Certain Acres of Land, 18 F. R. D. 98 (Georgia, 1955) .....	35
United States v. Cobb, 328 F.2d 115 (9th Cir., 1964).....	43
United States v. Continental Cas. Co., 303 F.2d 91 (4th Cir., 1962) .....	41
United States v. Cotton Valley Operators Committee, 9 F. R. D. 719 (1950) .....	42
United States v. 6.82 Acres of Land, etc., 18 F. R. D. 195 (N. Mexico, 1955) .....	35
United States v. 23.76 Acres of Land, etc., 32 F. R. D. 593 (1963) .....	16, 17, 29
United States v. 38 Cases, More or Less, etc., 35 F. R. D. 357 (1964) .....	19, 20
United States v. 50.34 Acres of Land, 13 F. R. D. 19 (1952)	37

## TABLE OF AUTHORITIES CITED

iii

	Pages
United States v. 62.50 Acres of Land, etc., 23 F. R. D. 287 (1959) .....	17
United States v. 900.57 Acres of Land, etc., 30 F. R. D. 512 (Arkansas, 1962) .....	35
United States v. 3,595.98 Acres of Land, etc., 212 F. Supp. 617 (1962) .....	31
United States v. 7,534.04 Acres of Land, etc., 18 F. R. D. 146 (Georgia, 1954) .....	35
United States v. 284,392 Square Feet of Floor Space, etc., 203 F. Supp. 75 (1962) .....	36
United States v. Nysco Laboratories, Inc., 26 F. R. D. 159 (1960) .....	19
United States v. Woodbury, 263 F.2d 784 (9th Cir., 1959) ..	4

## Rules

	Pages
Rules of the United States District Court, Northern District of California:	
Rule 4(11) .....	39
Rules of the United States District Court, Southern District of California:	
Rule 9(e) .....	39
Rule 9(h) .....	31, 39
Federal Rules of Civil Procedure:	
Rule 26 .....	32, 36
Rule 26(b) .....	28, 30
Rule 34 .....	37
Rule 37 .....	41
Rule 37(b) .....	29, 40, 41, 42, 44
Rule 37(f) .....	32
Rule 41(b) .....	42, 44
Rule 45 .....	40
Rule 71A(a) .....	34, 43, 44

## Texts

Judge James M. Carter, "A New Approach," Journal of The American Judicature Society, vol. 40, no. 3, p. 78 (1956) ..	39
Professor Friedenthal, "Discovery and Use of an Adverse Party's Expert Information," 14 Stanford L. Rev. 455 (1962) .....	22



No. 21,127

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

UNITED STATES OF AMERICA,

*Appellant,*

VS.

HORACE MEYER, et al.,

*Appellees.*

**Appeal from the United States District Court for the  
Northern District of California,  
Northern Division**

**BRIEF FOR HORACE MEYER, APPELLEE**

---

**STATEMENT OF THE CASE**

This is an appeal by the plaintiff, United States of America, from the judgment entered in the above-entitled action on May 10, 1966, dismissing the cause of action and striking from the court's records the Complaint in Condemnation and the Declaration of Taking and the Order for Delivery of Possession. (R. 165-166) The judgment is based upon findings of fact and conclusions of law (R. 156-162) by which the court found that the United States of America had willfully and without substantial justification or adequate excuse refused to make discovery within the



meaning of Rule 37 of the Federal Rules of Civil Procedure and that the United States of America had willfully and without substantial justification or adequate excuse caused witnesses to disobey subpoenas duces tecum within the meaning of Rule 45 of the Federal Rules of Civil Procedure. (R. 156-162) The findings of fact further recite that the United States of America, through its attorney, had stated that any order compelling answers to the questions propounded on oral deposition and any order to obey the subpoenas duces tecum would be refused by the witnesses on the instruction of the United States of America; and the court held the United States of America in contempt of court and, under the provisions of Rules 37 and 45 of the Federal Rules of Civil Procedure and in its inherent power to punish contempt of court, dismissed the Complaint in Condemnation and the Declaration of Taking and set aside its Order for Delivery of Possession previously filed in the action.

The case involves the important questions of the scope of discovery in federal condemnation cases and whether or not the United States of America may disobey orders of discovery in such cases without being subject to the sanctions set forth in Rule 37 of the Federal Rules of Civil Procedure.

---

#### STATEMENT OF FACTS

The United States of America filed its Complaint in Condemnation in the instant action, together with a Declaration of Taking, on January 15, 1964. (R.

1-11) By its complaint, the United States sought to acquire two designated parcels of land, totaling 364.82 acres located in the County of Mariposa, State of California, owned by Horace Meyer, for use in connection with the Yosemite National Park. (R. 2) An order for delivery of possession was entered on the same day. (R. 12)

On September 30, 1964, defendant, Horace Meyer, noticed the depositions of Robert Wilson, James Hopper, and Charles Sortor for December 19, 1964. (R. 20-22) These three individuals had made appraisals of the defendant's property at the request of the National Park Service. On October 13, 1964, the United States moved for a protective order, asking that each of the deponents not be interrogated as to his opinion of the value of the subject property, his opinion of the highest and best use of the subject property, any matter of opinion or conclusions reached upon a consideration of facts ascertained by the deponent, upon or about any written report that the deponent may have submitted to the National Park Service or other agency of the United States Government, as to any matter presumably within the knowledge of the defendant or for the purpose of cross-examination in the event that the deponent testified as a witness at the trial of the action. (R. 29-36) The motion was fully briefed by the parties (R. 44-61; 69-90; 91-103); and on October 27, 1965, the District Court filed its memorandum and order denying the United States' motion for a protective order and ruling that the defendant was entitled to the discovery

which the United States had sought to block. (R. 104-113. The District Court's opinion may also be found at 38 F.R.D. 411 (1965))

The United States informed the District Court of its intention to appeal from the memorandum and order denying the United States' motion for a protective order; and on November 1, 1965, the District Court, at the request of the United States, amended its order to provide that it was the opinion of the court that if, in its discretion, the Court of Appeals were to permit an immediate appeal to be taken from the order, it would materially advance the ultimate termination of the litigation. (R. 114) On November 23, 1965, this Court denied the motion of the United States seeking leave to appeal from an interlocutory order under the authority of *United States v. Woodbury*, 263 F.2d 784 (9th Cir., 1959). (R. 115)

The defendant thereupon renoticed the depositions of Robert Wilson, James Hopper, and Charles Sortor for December 27, 1965. (R. 116-118) Subpoenas were issued for each of the witnesses, commanding them to bring "all records, maps, photographs, data on comparable sales, reports on water supply or the lack thereof, a complete list of the settlements and payments made by the United States for Foresta lots or property, together with a list of Foresta lots, if any, which have not been acquired, subdivision reports, utility company reports, soil or agricultural reports, books, papers, documents, and tangible things which now are or may be in your possession, and which are related to the above-entitled cause." These subpoenas

contained the same language as that contained in the earlier subpoenas issued for the depositions of the witnesses which had been noticed prior to the motion for a protective order filed by the United States. The United States requested a continuance of the depositions and then on January 10, 1966, when the depositions were taken, without first seeking to quash the subpoenas, refused to permit the witnesses to turn over the great bulk of the records and papers which had been subpoenaed. The United States also refused to permit the witnesses to testify concerning the matters which the court had already ruled were subject to discovery in its Memorandum and Order denying the United States' motion for a protective order.

As stated by the United States in its opening brief, each deposition followed a similar pattern. None of the witnesses brought with him the records which had been subpoenaed. Each witness had turned his files over to the Assistant United States Attorney who, with the exception of a few innocuous maps and photographs, refused to turn over any of the material which had been subpoenaed.

The first deposition was Robert B. Wilson, an independent real estate appraiser. He initially testified that he first became familiar with the condemned property in the middle of 1963. (W. Dep. 3)<sup>1</sup> However, he later testified that he was employed by the National Park Service on December 27, 1962 (W. Dep.

---

<sup>1</sup>For the purposes of this brief, "Dep." refers to the transcripts of the depositions, while "W" indicates Wilson, "S" indicates Sortor, and "H" indicates Hopper.



12-14), and he then acknowledged that he first became interested in the property in August, 1962. (W. Dep. 24) Mr. Wilson received a letter dated August 30, 1962, from the National Park Service; but the United States refused to produce this letter on the ground that it contained material which Mr. Wilson had subsequently placed on it. (W. Dep. 17) The United States also refused to produce the documents pertaining to his employment and payment for services. (W. Dep. 13) The United States next refused to produce a map of the defendant's property, which was contained in Mr. Wilson's files, on the ground that it contained pencil notations reflecting field notes and interviews. (W. Dep. 19-21) It refused to produce other maps of the defendant's property on the ground that they contained penciled notations of opinions formulated by the witness (W. Dep. 25-26) and refused to permit Mr. Wilson to testify as to what other property he had been working on in the area. (W. Dep. 27) It refused to permit him to state the dates of other appraisals that he had made with reference to the subject property (W. Dep. 27) and refused to allow the witness to state where the other property was located with reference to the Meyer property. (W. Dep. 28) Mr. Wilson was not permitted by the United States to state the amount of time that he had put in on the appraisal of this other property or whether he had used the property as a comparable in arriving at his opinion on the Meyer property. (W. Dep. 28) He was not permitted to give his opinion as to the fair market value of that property, whether any severance damage

was involved therein, or even to give the general nature and character of that property in relationship to the Meyer property insofar as comparability was concerned. (W. Dep. 28-29) When he was asked what compensation he had received for the other appraisals, Mr. Wilson said that he didn't recall. (W. Dep. 29)

The United States refused to permit Mr. Wilson to produce his letter of transmittal and report concerning the Meyer property. (W. Dep. 31-32) Mr. Wilson stated that the report contained a list of comparables, but the United States refused to permit him to testify how many comparables were contained in the report. (W. Dep. 32) The Government also refused to permit Mr. Wilson to testify how many of the comparables he had considered in arriving at his opinion of the value of the Meyer property. (W. Dep. 33) Mr. Wilson testified that he first went out to the McCauley ranch property, one of the defendant's parcels sought to be condemned by the United States, in the summer of 1962 (W. Dep. 38), but the United States would not let him say when he was next on the property, although the witness did testify that he was on the property approximately six times. (W. Dep. 39-40) He was not permitted to testify who accompanied him when he next went on the defendant's property. (W. Dep. 40) He was not permitted to give his opinion of the fair market value of the defendant's property (W. Dep. 41-43), nor was he permitted to testify whether, in formulating his opinion of the fair market value of the property, he took into consideration any sales at Wawona. (W. Dep. 44) Indeed, he was instructed



by the United States not to state any of the parcels of sale that he took into consideration in formulating his opinion of the value of the condemned property. (W. Dep. 44) The United States wouldn't even permit him to describe the nature and character of the condemned property at Big Meadow (W. Dep. 44) and wouldn't allow the witness to state what he concluded was the highest and best use of any or all of the defendant's property. (W. Dep. 45)

The United States wouldn't allow Mr. Wilson to state his opinion of the fair market value for either the Big Meadow property or the McCauley 40 acres (W. Dep. 46), nor would it permit him to answer whether he had any information which would cause him to vary his conclusion of the value of these properties. (W. Dep. 47) He was not permitted to give a full answer concerning the compensation he had received from the United States (W. Dep. 50), nor was he allowed to answer what he had found out about the water rights on Big Meadow or McCauley at the Assessor's Office in Mariposa. (W. Dep. 50) The Government refused to let him answer any questions concerning comparable sales (W. Dep. 52-53) and likewise wouldn't let him answer any questions concerning his evaluation of the condemned property. (W. Dep. 53-54) It refused to permit him to answer with whom he had consulted insofar as his evaluation of the property was concerned and wouldn't permit him to testify whether he had discussed the matter with Mr. Hopper, one of the Government's other appraisers. (W. Dep. 53-54) It refused to permit him to answer whether he

was familiar with particular sales in the area specified by defense counsel. (W. Dep. 55-56) Finally, Mr. Wilson testified that he was familiar with the District Court's decision which had previously been rendered in the case, but still refused to produce or to answer the questions solely upon the advice, instruction, and direction of the Assistant United States Attorney. (W. Dep. 55)

Charles H. Sortor, a consulting engineer, was the next witness. He testified that he started work in connection with his evaluation of the defendant's property for the National Park Service in September, 1962. (S. Dep. 6) He estimated the market value of the defendant's property as of October 4, 1962. (S. Dep. 8) He went on the defendant's property about October 10, 1962. (S. Dep. 10) As in the case of Mr. Wilson, Mr. Sortor refused to turn over the subpoenaed materials (S. Dep. 3) and was instructed not to give any information concerning comparable sales (S. Dep. 11) or the fair market value of the defendant's property. (S. Dep. 11-13)

James A. Hopper, a licensed real estate broker and independent real estate appraiser, was the final witness. He, too, didn't bring any of the papers which had been subpoenaed but simply turned them over to the United States Attorney, who refused to produce the materials. (H. Dep. 3-10) His first appraisal of the Meyer property was on January 19, 1952; and he prepared and filed a written report on that appraisal. (H. Dep. 13) His next appraisal and report was more than ten years later, on August 21, 1962. (H. Dep. 13)

He has made no further appraisal of the Meyer property since August 21, 1962. (H. Dep. 31) The United States refused to deliver either of the appraisals (H. Dep. 14) and refused to permit Mr. Hopper to answer any questions concerning either of his appraisals of the defendant's property. (H. Dep. 20-21) It directed Mr. Hopper not to answer whether he had included the various sales of the Foresta parcels, which bordered on the defendant's property, in his list of comparables (H. Dep. 24-25); and it refused to allow Mr. Hopper to answer any questions relating to other condemnation cases in which he had testified for the United States. (H. Dep. 28)

Following these abortive depositions, the defendant moved for an order compelling the witnesses to answer all of the questions which they had refused to answer or which plaintiff's counsel had instructed them not to answer and also moved for an order holding the witnesses in contempt for failure to obey the subpoenas duces tecum served upon them to compel them to produce the items listed in the subpoenas. (R. 122-134) At a hearing held on the defendant's motions on April 18, 1966, the Assistant United States Attorney stipulated that all the procedural steps had been properly taken, stated that the United States took full responsibility for the failure to produce the subpoenaed records and papers and the refusal to answer the questions propounded at the depositions, and acknowledged that the court might, as one of its consequences for failure to comply with the court's previous order and decision, strike the pleadings or

parts thereof or dismiss the action or proceeding or any part thereof. Counsel representing the United States further stated that the United States felt that the court was wrong, that it would not comply with an order compelling the witnesses to answer the questions propounded at the depositions and that the United States would take an appeal in the case. Mr. Burbank stated to the court:

“The existing order denies the Government’s motion for a protective order, and it would seem to me under the circumstances, in the light of the motion filed by Mr. Robinson, counsel for the defendant, that if the court feels the Government’s position in this regard is in error, that it would order the witnesses to answer the questions propounded at the taking of the depositions insofar as they were dealt with in the court’s earlier memorandum and with rare exceptions I would suggest that the court’s memorandum adequately covered that matter.

“Now, on behalf of the witnesses, I would have to state to the court that the witnesses would continue, with all respect, at the request of and the advice of the United States attorney, to decline to answer those questions.”

The court thereupon dismissed the action, pursuant to the findings of fact and conclusions of law filed on May 10, 1965; and this appeal has ensued.



## ARGUMENT

- I. THE DISTRICT COURT PROPERLY HELD THAT THE DEFENDANT WAS ENTITLED TO DISCOVERY OF THE OPINIONS OF THE PLAINTIFF'S APPRAISERS, THE FACTS UPON WHICH THEY BASED THEIR OPINIONS AND THE REPORTS WHICH THE APPRAISERS SUBMITTED TO THE NATIONAL PARK SERVICE; AND THAT THE UNITED STATES HAD WILLFULLY FAILED TO COMPLY WITH THE COURT'S ORDER.

The instant case presents the question of the scope of discovery in federal condemnation cases. Throughout these proceedings, the United States has taken the position that a landowner whose property it seeks to condemn is not entitled to any meaningful discovery. Prior to the depositions of the three appraisers, the United States sought a protective order. As stated by Judge Halbert in his opinion denying the motion for a protective order:

“The Government requests an order prohibiting inquiry into the following: (1) the appraiser’s opinion of the value of the property; (2) the appraiser’s opinion of the highest and best use of the property; (3) any matter of opinion, or conclusion reached upon consideration of facts ascertained by the appraiser; (4) any written reports that the appraiser may have submitted to any agency of the United States Government; and (5) any matter presumably within the knowledge of the defendants. In addition, the Government seeks immunity for their appraisers from examination for the purpose of cross-examination at the trial.” (38 F. R. D. 411 at 412 (1965))

Following this Court’s order denying the United States’ motion seeking leave for an interlocutory appeal from the District Court’s order, the defendant

promptly re-noticed the depositions of the three appraisers and subpoenaed their records in language which was identical to the language contained in the original subpoenas served upon the appraisers. The United States did not file any motion to quash the subpoenas. Instead, it instructed the appraisers to turn over their records and files to the United States Attorney; and it refused to produce any of the records and reports, apart from a few innocuous maps and photographs, and it instructed the witnesses not to answer any of the questions which the District Court had already ruled were matters of proper discovery. Despite the District Court's previous order, the United States refused to permit the appraisers to state any opinions or the facts upon which they based their opinions. The Government refused to allow the appraisers to disclose any information concerning comparable sales or other property which the appraisers had taken into consideration in formulating their evaluation of the defendant's property. The transcripts of the depositions show a complete refusal on the part of the United States to comply with the prior ruling of the District Court.

In *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947), the United States Supreme Court stated:

“The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations in the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation, and fact-revelation were performed primarily and inadequately by the pleadings. In-



quiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . .

“We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.”

The United States, in the position it has advanced in the instant case, seeks to turn back the clock. It seeks

a return to the days when the "game" element was found in trial preparation and trials were carried on in the dark. It seeks a special status for the Government in condemnation cases which is contrary to the position which the Government itself has taken in other kinds of litigation.

In *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 376 (1961), Justice Peters, speaking for the California Supreme Court, commented concerning the California discovery laws, which had been adopted from the federal rules of discovery:

"The new system, as was the federal system (Moore's Federal Practice, vol. 4, pp. 1014-1016), was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial."

Justice Peters further noted that each of these purposes was generally expressed in *Hickman v. Taylor*, *supra*.

The United States argues "here there is only a single issue, i.e., just compensation". (Appellant's Brief, p. 26) It further argues, "Since the issue ultimately turns largely on the weight to be given the opinions of the experts, the parties are entitled to, and do, show all the considerations upon which their conclusions are based." (Appellant's Brief, p. 26) This is precisely why full discovery should be allowed of the appraisers' opinions and all the facts and considerations upon which they based their opinions. Indeed, it is the heart of the District Court's decision denying the Government's motion for a protective order. The District Court stated:

"The rationale behind the eminent domain power is that in certain circumstances public necessity must take precedence over individual property rights. (citation) The exercise of that power, however, carries with it the correlative duty to protect individual rights to the fullest possible extent. (citations) . . . There is nothing sacred about the rights of the Government in eminent domain proceedings. The Government ought to be as frank, fair and honest with its citizens as it *requires* its citizens to be with it. That fairness will be enhanced by full disclosure of all matters that will expedite trial or encourage out-of-court settlements. I am now persuaded that the true and proper rule is the one laid down by the Court in *United States v. 23.76 Acres of Land, etc.*, D. C., 32 F.R.D. 593, as follows:

'Where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other

party intends to prove, what opinions his [opponent's] experts hold, the method by which those opinions were formulated, and the facts upon which they are based.' (32 F.R.D. at 597)" (38 F.R.D. 411 at 413, 415)

In *United States v. 23.76 Acres of Land, etc.*, 32 F.R.D. 593 (1963), the court held that owners of condemned land were entitled to discovery of the opinion of the Government's real estate appraiser and the facts considered by the appraiser in forming his ultimate opinion as to the value of the land. The court also held that the property owners were entitled to discovery of the Government expert's method of appraisal of the land. In reaching these holdings, the court noted that under state law, "full discovery as to expert witnesses is permitted in condemnation cases, and the results have been that the issues are sharpened and pointed, trial time is reduced, and settlements are encouraged." (32 F. R. D. 593 at 597) The court concluded by holding that where value is to be litigated through expert witnesses, the best way to avoid unfairness and secure "the just, speedy, and inexpensive determination of every action" is to make the expert data, opinion and material discoverable. See also *United States v. 62.50 Acres of Land, etc.*, 23 F. R. D. 287 (1959).

Since 1962, there has been full discovery of appraisers' opinions in condemnation cases brought in California state courts. In *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d 180 (1962), the California Supreme Court held that appraisers'



opinions were not privileged and were discoverable. The court stated:

“The purpose of the condemnation action (out of which this proceeding has arisen) is to determine the fair market value of the property. Assumedly, petitioner believes that its appraisers have arrived at a fair market value. If public interest, as the words are used in section 1881, would suffer by disclosure of the fair market value of the condemned property, then the statute on privilege would have to fall before the constitutional requirements that no private property be taken without due process of law. (citations)” (58 Cal.2d 180 at 187)

In reaching this decision, the court relied upon *People ex rel. Dept. of Public Works v. Donovan*, 57 Cal.2d 346 (1962), where it was held that where the condemning authority had failed to call its own appraiser at the trial of a condemnation action, the defendant was entitled to call that appraiser as a witness and elicit from him not only the facts which he had determined, but also his opinion as to the value which he had transmitted to plaintiff's counsel. The real estate appraiser, who obtains his information by viewing the adversary's property, by recourse to public records of permitted land use, and from comparable sales, is not transmitting a client's "confidence". Thus, there cannot be any question of attorney-client privilege; and indeed, the United States has conceded that the attorney-client privilege is not involved herein.

In addition to the cases set forth above, the opinions of experts have been held to be discoverable in a num-

ber of federal cases. (*Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir., 1948); *Bergstrom Paper Co. v. Continental Ins. Co. of City of N.Y.*, 7 F. R. D. 548 (1947); *Leding v. U.S. Rubber Co.*, 23 F. R. D. 220 (1959); *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.*, 21 F. R. D. 347 (1958); *Russo v. Merck & Co.*, 21 F. R. D. 237 (1957)) Indeed, the United States has obtained the opinion of experts in cases where it has taken a diametrically opposed position to the one which it takes in the case at bar. (*Seven-Up Bottling Co., Inc. v. United States*, 39 F. R. D. 1 (1966); *United States v. 38 Cases, More or Less, etc.*, 35 F. R. D. 357 (1964); *United States v. Nysco Laboratories, Inc.*, 26 F. R. D. 159 (1960)) In the *Seven-Up* case, the question of appropriate valuation of certain corporate assets under the provisions of the Internal Revenue Code was involved. The United States served notice to take the deposition of the corporation's expert witness, and the corporation objected. The court overruled the objection, stating:

“The Government maintains that it must take this deposition so as to prepare itself to cross-examine the expert at the trial. They wish to question him as to his method of valuation, his basic assumptions, and his analysis as well as the weight which he gives to facts in the case. Plaintiff's position is that the witness has been employed by counsel and not by the plaintiff and from this argues that his testimony has an aspect of privilege. . . . The interests of the deposing party in gaining information for trial is weighed against the hardship which the other party will suffer in terms of expense and prejudice to his



case. It would, though, appear that the underlying factor which causes the courts to treat expert testimony somewhat differently from testimony of other witnesses is that the party has an investment in the witness. Somehow it is believed that he has bought and paid for the witness and that the other party should not share in his property. We cannot accept this "oath helper" approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or to the most resourceful litigant." (39 F. R. D. 1 at 2)

In the instant case, the United States has taken the position that the defendant was not entitled to take the deposition so as to prepare himself for cross-examination of the experts at the trial. The *Seven-Up* case not only demonstrates that the Government in the case at bar is taking an inconsistent position but also shows that the position advanced by the Government herein is wrong.

The United States has also claimed that the opinions of its experts are protected as work product. It is not clear how or why the opinions of the experts, as distinguished from their reports, might be considered to be work product. In *United States v. 38 Cases, More or Less, etc., supra*, the Government sought to condemn a drug on the ground that it had been mislabeled. It noticed the depositions of the defendant's expert witnesses; and the defendant objected on the ground that this would invade the defendant's work product. The court denied the defendant's motion for a protective order, holding:

“[T]hat experts may provide evidence for a party does not, ipso facto, make them technical advisors to a lawyer and their advice and reports a part of his work product. (citation) . . . It is likely in this case that expert testimony will be available on both sides and the issues be defined in large measure through such testimony. If such testimony is to be understood by the trier of fact, it is essential that there be an orderly presentation of relevant facts at trial.” (35 F. R. D. 357 at 361, 364)

The court held that since the witnesses would have evidence as to the substance of the issues involved in the case, they become a potential source for evoking facts; and their opinions should be discoverable.

The Government argues that the work product principle of *Hickman v. Taylor, supra*, should preclude discovery of the appraisers' opinions and records. Initially, we note that *Hickman* dealt with an attempt to discover the attorney's thought processes. The Supreme Court, in holding that a party is not entitled to obtain the files and mental impressions of adverse counsel, emphasized that this did not mean that the information which an attorney had secured from a witness was non-discoverable. Indeed, the court's opinion emphasizes the liberal treatment to be applied to the discovery rules; and Justice Jackson's concurring opinion, which has been relied upon by the United States herein, states:

“It seems clear and long has been recognized that discovery should provide a party access to

anything that is evidence in his case.” (329 U.S. 495 at 515)

The Government argues that the function of the appraiser is similar to that of the attorney. We disagree. The appraiser is a person who will testify and give evidence upon which the trier of the fact will make its decision. The attorney has no such function. His function is to be an advocate—not a witness. Discovery will not prevent the appraiser from being “free to go about his way ascertaining the facts, investigating sales, interviewing parties to the sales or other persons in the vicinity, rejecting irrelevant facts, preparing his valuation theories, etc.” (Appellant’s Brief, p. 50) It will simply mean that the Government will not be able to hide the appraisers’ opinions and the facts upon which they base their opinions in the dark and then spring them on the defendant landowner at trial. Full discovery of the experts’ opinions and the facts upon which they base their opinions, including comparable sales, will bring this important testimony into the light of day in advance of trial, so that the search for truth will be enhanced and the chances of settlement greatly increased. It should also improve the quality of the appraisers’ work and the thoroughness with which they prepare their reports.

As Professor Friedenthal in his outstanding article, “Discovery and Use of an Adverse Party’s Expert Information”, 14 Stanford L. Rev. 455, 472-473 (1962), states:

“Whatever the effect of the *Hickman* doctrine on agents in general, there seems little justifica-

tion for extending work product to cover expert information. The opinions and conclusions of an expert are not those which *Hickman* sought to protect. Unlike the attorney's impressions or those of the client or his investigators as to the value of certain evidence or the veracity of a potential witness, the opinions and conclusions of an expert constitute evidence in themselves, and may be the only way in which to establish facts material to the case. Indeed, the report of an expert to the attorney is sought for the very purpose of obtaining such facts and it can hardly be said that once in the hands of the attorney the information becomes 'protected conclusions' any more than does an eye-witness account by any other witness. The demoralizing aspects of discovery foreseen in the *Hickman* case are certainly not present when a deposition is taken, since the only danger is that the expert might trip himself should he change his testimony at the trial. It is apparent that in this respect the expert is no different from any other witness who has information relevant to the case."

Throughout its brief, the Government repeatedly states that it has not accepted or approved the work of the appraisers. On page 24 of its brief, the United States argues:

"The United States has not approved or accepted, and does not vouch for, the opinions of the persons here examined or the reasoning by which their results were reached."

We respectfully submit that whether or not the United States has accepted or approved the work of the appraisers has absolutely no bearing whatsoever



on the discoverability of the appraisers' opinions and reports. Indeed, if the United States has not accepted the appraisers' reports, how can these reports be considered attorney's work product? In this connection, we note that none of the appraisers in the instant case were hired by Government counsel. All of them were hired by the National Park Service long before the United States filed its complaint in condemnation. Mr. Hopper's first appraisal of the Meyer property was on January 19, 1952, 14 years before the filing of the complaint in condemnation. His next appraisal was in August, 1962, 17 months before the filing of the complaint in the instant case. Similarly, the appraisals of Mr. Wilson and Mr. Sortor were made more than a year before the Government ever filed suit. Simply because these reports have been turned over to the United States Attorney does not make them privileged, nor does it mean that the opinions of the experts or their reports are non-discoverable. (*Hickman v. Taylor, supra*; *San Diego Professional Assn. v. Superior Court*, 58 Cal.2d 194 (1962); *S.F. Unified School Dist. v. Superior Court*, 55 Cal.2d 451, 457 (1961))

The Government argues:

"It is not fair to prejudice the rights of a party—here the United States—by requiring such premature disclosure without an opportunity first to review and approve or disapprove the appraisers' processes. The initial report by an appraiser is simply a foundation upon which his testimony is based after thorough testing by the attorney and revision when necessary." (Appellant's Brief, p. 24)

How can the Government talk about "premature disclosure" in the instant case? It has had the appraisers' reports for years. The last report was rendered by Mr. Sortor in October, 1962, more than five years ago. Clearly, it has had ample time to evaluate the reports.

Moreover, we are frank to say that we are troubled by the implications which arise from the Government's apparent practice of revising the reports of its experts with which it is not satisfied. The Government states that the appraiser's report "is no more than an initial beginning from which his final testimony is fashioned in conjunction with the lawyer" (Appellant's Brief, p. 42) and that:

"The result of these reviews is often a decision not to present the testimony of particular appraisers or, more frequently, revision of their reasoning, supplementation of data, and *possible change of opinion*, primarily because of the difference between federal condemnation principles and applied by many states." (Appellant's Brief, pp. 42-43) (emphasis ours)

These admissions by counsel demonstrate the urgency and necessity for full discovery of the experts' opinions and reports. They graphically illustrate how important discovery of the opinions, the facts underlying the opinions, and the reports themselves are to insure that the defendant is accorded full and complete due process of law. They bespeak a Departmental philosophy which we fear is akin to the recent disclosure of the use of illegal wiretapping by the Department of Justice. Along with the constant emphasis by the



Government of the landowner's burden of proof of evaluation without any mention whatsoever of the Government's duty to afford due process of law to the defendant whose property the Government seeks to condemn, they show an attitude of "victory at whatever the tactic" and a complete disregard of the rights of the individual.

We cannot believe that the appraisers employed by the Government are so incompetent that they require constant education by counsel. If the Government does not like the opinion given by its expert, it is free not to use that expert at trial; but certainly the landowner should be equally free to call the expert as his witness and produce the testimony that the Government does not wish to present. (See, e.g., *People ex rel. Dept. of Public Works v. Donovan*, 57 Cal.2d 346, 354 (1962)) If the expert's reasoning is faulty for some reason, the United States may cross-examine the witness and establish the faulty basis for the expert's opinion. In this manner, the lawsuit will truly be a search for truth, and the expert witness will become more than simply a paid "lackey" of counsel.

The Government next argues that discovery of the appraisers' procedures and mental processes in the making of the appraisal would annoy and embarrass the appraisers. This is ridiculous. How are appraisers different from any other kind of experts in this regard? If the appraiser's work has been inadequate, this should be subject to discovery and brought to

light in advance of trial. If the appraiser has failed to consider something which should have been considered, this should be open by way of discovery. The Government states that the comparable sales cited by the appraiser may not support the appraiser's result. If that is so, certainly it should be discoverable, so that both sides can properly evaluate and prepare their case for trial. Clearly, this will encourage settlements and increase the probability that the truth will be found at trial.

It is not true, as argued by the Government, that the only possible use that the defendant could make of the materials he has sought would be to discredit the appraisals or to secure the admission, by indirection, of evidence which is not admissible in federal condemnation trials. (Appellant's Brief, p. 41) The reasons for liberal discovery are well set forth in both the *Greyhound* decision of the California Supreme Court and *Hickman v. Taylor*, *supra*. They are numerous and range from ascertaining the evidence which will be presented at trial to enabling the attorney to more properly evaluate his case and possibly achieve a settlement for his client. This Court, in *Martin v. Reynolds Metal Corp.*, 297 F.2d 49 (9th Cir., 1961), in an opinion by Judge Duniway, stated:

“One of the purposes of the Federal Rules of Civil Procedure was to take the sporting element out of litigation, partly by affording each party full access to evidence in the control of his opponent. To that end, Rule 34, like the other rules relating to discovery, is to be liberally construed. (citations)” (297 F.2d 49 at 56)

The Federal Rules of Civil Procedure, permitting the ordering of the taking of a deposition, do not require that inquiry at deposition be limited to evidence which would be material and admissible in evidence at trial. (*Martin v. Reynolds Metal Corp.*, *supra*) The scope of examination on deposition includes inadmissible testimony reasonably calculated to lead to the discovery of admissible evidence. (Rule 26(b), Federal Rules of Civil Procedure; *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.*, 21 F. R. D. 347 (1958)) Nor does the mere fact that the matters inquired into in pre-trial examination are of general public knowledge or are within the knowledge of the examining party necessarily bar inquiry with regard thereto, since admissions as to those facts may serve to limit the area of dispute and may eliminate the necessity for introduction of evidence as to such facts at trial. (*Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.*, *supra*)

The Government also claims that discovery will delay and prolong trial. Considering the fact that the Government has delayed the instant case for more than two years through its refusal to comply with the District Court's order, we respectfully submit that the Government is hardly in any position to talk about delay. If the Government had followed the terms of the court's order and permitted the appraisers to testify at their depositions and turn over their records and reports, the case probably would have been brought to trial by this time and the matter concluded. Instead, the United States took an adamant

position in complete defiance of the court's order; and the District Court properly exercised its discretion under Rule 37(b) of the Federal Rules of Civil Procedure and dismissed the action.

Full discovery of the appraisers' opinions, the facts upon which they base their opinions and the appraisers' records and reports will not delay or prolong the trial of condemnation actions. Indeed, discovery has been shown to be an effective tool for avoiding trial by settlement and narrowing the areas of disagreement, so that if settlement cannot be obtained, trial time may be saved. If the Government's appraiser and the landowner's appraiser both agree as to the highest and best use of the condemned property, this can be stipulated to and trial time saved. If the appraisers agree as to water rights or mineral rights, trial time can be saved in that direction. If the appraisers agree concerning the use of certain sales as comparables, this can enable the court and counsel to save time at trial. If the appraisers can agree concerning any of the factors which make up the valuation of the property which is being condemned or the property which is remaining, this can be of assistance to the court. As the court stated in *United States v. 23.76 Acres of Land, etc.*, 32 F.R.D. 593 at 597 (1963):

“As the government stresses in this case, the unfairness rule is to be determined by federal law, not by state law, yet the Court cannot disregard that, under Maryland law and in Maryland state courts, full discovery as to expert witnesses is permitted in condemnation cases, and



the results have been that the issues are sharpened and pointed, trial time is reduced, and settlements are encouraged."

The Government claims that settlements and appraisals of other properties are not admissible in evidence and should, therefore, be non-discoverable; and, further, that the various notes made by the appraisers in the course of their investigations are remote from the issue in the case, as are "comparable sales rejected". (Appellant's Brief, p. 38) We strongly disagree. First, we again note that admissibility in evidence is not the test of whether or not a matter is discoverable. (Rule 26(b)) Settlements made by the Government in other condemnation cases may well shed light on the evaluation of the property in issue and certainly should be discoverable, regardless of whether or not they are admissible. The Government, of course, has this information and should not be permitted to deny the information to a landowner whose property it seeks to condemn. Likewise, the appraisal of the property next door, which the Government has obtained, may well show the Government's appraisal of the defendant's property to be inaccurate, erroneous or false. If the Government elects to shop around for "better appraisals", fire appraisers whose evaluations it does not like or gets the appraiser to modify or totally change his report, this should be brought to the light of day so that justice and due process can be secured. The Government should not ask the court to be a party to or to condone such practices.



The Government claims that “purely factual data” was not refused. We again disagree. Comparable sales are factual data. They are also discoverable. (*United States v. 3,595.98 Acres of Land, Etc.*, 212 F. Supp. 617 (1962); Rule 9(h) of the Rules of the United States District Court, Southern Division) Yet, none of the witnesses were permitted to list the comparable sales which they had used in evaluating the defendant’s property. The United States wouldn’t even permit Mr. Wilson to describe the nature and character of the condemned property at Big Meadow. (W. Dep. 44) It wouldn’t permit him to give the dates when he was on the defendant’s property or who accompanied him when he went there. (W. Dep. 39-40) It wouldn’t permit him to state the dates of other appraisals that he had made with reference to the subject property or to state where the other property was located with reference to the Meyer property. (W. Dep. 27-28) It wouldn’t permit him to state any of the parcels which he had taken into consideration in formulating his opinion of the value of the condemned property. (W. Dep. 44) It refused to permit him to state with whom he had consulted insofar as his evaluation of the property was concerned (W. Dep. 53-54) and wouldn’t permit him to state what he had found out about the water rights on the defendant’s property. (W. Dep. 50) The answers to these and many other questions seeking “purely factual data” were refused by the Government in complete defiance of the court’s opinion and order.

The Government also raises the question of compensation of the appraisers. In view of its complete refusal to provide any meaningful discovery in this case, we question the propriety or sincerity of this argument. The United States was responsible for the failure of the experts to comply with the subpoenas which were served upon them and their refusal to answer the questions propounded to them in the depositions. Under Rule 37(f) of the Federal Rules of Civil Procedure, expenses and attorneys' fees may not be imposed upon the United States for failure to comply with the court's orders regarding discovery. But for that rule, the court probably would have granted monetary sanctions against the United States for its conduct in the instant case. It would seem completely fit and proper in view of the circumstances involved herein for the Government to be required to compensate the appraisers for their time in the abortive depositions.

Finally, the Government claims that good cause was not shown by the defendant in the instant case. First, it should be noted that the requirement of good cause is contained only in Rule 34 of the Federal Rules of Civil Procedure, which sets forth the requirements for obtaining documents and papers by means of a motion to produce. The requirement of "good cause" is not contained in Rule 26 of the Federal Rules of Civil Procedure, governing the scope of discovery in depositions. Good cause is not required for obtaining answers to questions propounded in depositions.

Moreover, as the court stated in *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 33 F. R. D. 306 at 308 (1963) :

“Even assuming that some showing of good cause had to be made, the views of Chief Judge Wright in *United* support the conclusion that even a minimal showing should be sufficient unless persuasive reasons exist to the contrary. In my view, a minimal showing lies in the need to know and understand not only the facts, but also the theories and the method of approach upon which the adversary’s experts rely.

“Under such circumstances, at the very best, pre-trial examination may reveal such major defects in the reasoning and conclusions of the experts of one side or the other as to lead to settlement or, at the very least, enable counsel to prepare a searching and informative cross-examination for the purpose of laying bare the relative abilities of the various experts so that a jury of laymen can best weigh and assess the value of their testimony. 74 Harvard L. Rev. 940 (1963).”

We respectfully submit that sufficient good cause was shown for the obtaining of all of the appraisers’ records and reports. Good cause was shown by the fact that from 1952-1962 at least three appraisers hired by the National Park Service have come onto the defendant’s property on numerous occasions and have evaluated the property. Good cause was shown by the Government’s concession that value is the sole issue in the case and that a determination of that issue would be made largely on the weight to be given the opinions of the experts. Good cause has been

shown by the Government's admission that it frequently gets its appraisers to revise and even change their opinions.

The Government also relies on Rule 71A(c) for its position herein. That is simply a rule of pleading and has no applicability to the question of discovery involved in the instant case. Simply because the plaintiff does not have to plead its claims of value does not mean that it may refuse to allow discovery of the opinions of its experts. Obviously, discovery extends beyond the narrow confines of the pleadings. Otherwise, where value is the only issue in the case as the plaintiff contends herein, there would be no discovery at all. Perhaps this is what the Government desires, but it is not and should not be the law.

The cases cited by appellant are not in keeping with the liberal approach to discovery set forth in *Hickman v. Taylor*, *supra*. Most of them rely heavily upon the case of *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21 (1940), which has also been cited by appellant herein. The *Lewis* case, which is generally considered to be the leading case denying discovery of the opinion of the adverse party's expert, was decided in 1940, long before the Supreme Court's landmark decision in *Hickman v. Taylor*, *supra*. The heart of the decision has been quoted on pages 54-55 of Appellant's Brief; and, we respectfully submit, demonstrates an acceptance of the "oath helper" approach to discovery, which is completely inconsistent with the aims and purposes of modern day discovery and the duty of the Government to afford



due process of law to the party whose land it seeks to condemn. The court's statement that "to permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion" is likewise unsound and incorrect. Where expert opinion concerning valuation of property is the heart of the case, it is essential that discovery of that opinion be allowed to avoid confusion, changing of reports, and possible perjury.

*United States v. 7,534.04 Acres of Land, etc.*, 18 F. R. D. 146 (Georgia, 1954); *United States v. 6.82 Acres of Land, etc.*, 18 F. R. D. 195 (N. Mexico, 1955), and *United States v. Certain Acres of Land*, 18 F. R. D. 98 (Georgia, 1955), cited by appellant herein, all relied heavily upon the *Lewis* case without any real consideration of the part that discovery can and properly should play in the preparation of condemnation actions. *United States v. 900.57 Acres of Land, etc.*, 30 F. R. D. 512 (Arkansas, 1962), also cited by appellant, likewise denies discovery on what we respectfully believe is an artificial basis, namely that "this is the first instance in which a landowner has filed interrogatories or has sought to obtain appraisal reports". (30 F. R. D. 512 at 521) The court's comment that this "would be an innovation and greatly prolong the trial" is, we respectfully submit, unsound. Discovery expedites and facilitates both preparation and trial, encourages settlements, and narrows and defines the areas of agreement and disagreement. The investment in one or two (or in this case three) depositions is a minor expense com-



pared to the alternative—day after day of delay and confusion at trial while the attorneys attempt to combat the surprise which is inherent in the absence of discovery.

In *United States v. 284,392 Square Feet of Floor Space, Etc.*, 203 F. Supp. 75 (1962), cited by appellant, while the court did prohibit discovery of the expert's opinion, it did recognize that questions of fact are discoverable and that opinion and fact may be intertwined. Thus, the court stated:

“It must be noted that even here areas of fact and opinion are intertwined. For example, ‘modernity’ of air conditioning involves both fact and opinion. However, a liberal approach must be adopted, lest any inquiry of fact fail because it in some peripheral manner touches on the area of ‘opinion’.” (203 F. Supp. 75 at 78)

In the instant case, the Government refused to permit the appraisers to testify concerning the facts forming the basis for their opinions.

Finally, appellant relies upon *United States v. Certain Parcels of Land*, 15 F. R. D. 224 (1954). In that case, the court denied discovery on the ground that the opinions were “incompetent and immaterial as evidence unless and until the appraisers are called as witnesses upon the trial” and qualified as experts. (15 F. R. D. 224 at 233) Such reasoning violates the express provision of Rule 26 of the Federal Rules of Civil Procedure, which permits discovery of incompetent evidence if it “. . . appears reasonably calculated to lead to the discovery of admissible evidence.” We question whether the Government, which has hired the

appraisers and paid them with public funds, is in any position to claim that their chosen experts are unqualified. The decision in *United States v. Certain Parcels* certainly seems hyper-technical and clearly conflicts with the stated recognition by the court that:

“In many cases a pre-trial exchange of the opinions of appraisers intended to be called by each side undoubtedly would tend to shorten cross-examination and otherwise expedite adjudication. (citation) Discovery of the reports in advance of trial in such cases would clearly be in furtherance of the declared policy of the rules ‘to secure the just, speedy, and inexpensive determination of every action.’ (citation)” (15 F.R.D. 224 at 233)

In *U.S. v. 50.34 Acres of Land*, 13 F.R.D. 19 (1952), the court permitted discovery of the Government’s expert’s appraisal reports under Rule 34. In granting the condemnee’s motion for an order to permit him to inspect and copy two appraisal reports that were made for the Government prior to the institution of the condemnation action and at a time when the parties were negotiating for sale and purchase of the land, the court reasoned that as the reports were not privileged and as they were certainly relevant to the issue of just compensation, they should be produced. In commenting on this case, Professor Moore states:

“Although as a general rule a party will not be allowed to obtain discovery from the adverse party’s experts, a guarded relaxation of this doctrine in favor of the condemnee may, at times, be proper, at least in condemnation actions by the

Government. The condemnee is in the position of an innocent bystander who suddenly finds himself about to be dispossessed or already dispossessed merely because it has been determined by the government that his property is necessary for some governmental function. He may not recover his costs from the government. And the funds at his disposal in many (although not all) cases will be no match for those of the government. A desirable rule should be sufficiently flexible so that the district court may, on a showing of good cause and in the exercise of a sound discretion, permit discovery of expert appraisals and related materials that are non-privileged." (7 Moore, Federal Practice (2d ed., 1966), § 71 A. 20 [3], p. 2767)

In ordering discovery in the instant case, the District Court stated:

"I am of the view that full discovery of expert evaluation of land in eminent domain cases is fully consistent with the ideal of liberal construction of the Federal Rules expressed by the Supreme Court in *Hickman v. Taylor*, *supra*. To allow the participants to know what the other party intends to prove goes no further than the pleadings requirements of Rule 8, by which a party is required to state the relief to which he deems himself entitled. Where money value is the only question to be resolved (at least before a jury), it seems patently foolish to cling to wooden concepts of 'privilege' which more often than not obscure rather than illuminate. It goes without saying, however, that the allowance of discovery in these matters must cut both ways. The Government, as well as the condemnee, is entitled to know

what the other intends to prove.” (38 F. R. D. 411 at 415)

We respectfully submit that this ruling of full and mutual discovery is sound and amply supported by reason and precedent. It is also supported by the local rules of the United States District Courts in California. (See Rule 4 (11) of the Rules of the United States District Court, Northern District of California, and Rules 9 (e) and 9 (h) of the Rules of the United States District Court, Southern District of California. See also *Pre-Trial in Condemnation Cases: A New Approach*, by Judge James M. Carter in *Journal of the American Judicature Society*, vol. 40, no. 3, p. 78 (1956)) The Government has chosen to deliberately and willfully violate the order of the District Court. It is attempting to preserve in secrecy, until the very date of trial, all information as to its valuation of the land being condemned. Sooner or later, however, the experts must speak. One can only question the motives of the Government in attempting to maintain secrecy until the date of trial. The only explanation is that the plaintiff feels it necessary to rely on the element of surprise and the tactical advantage which accompanies such surprise; but this is hardly in keeping with its role of serving as officers of the court and assuring that “just compensation” be determined.

We respectfully contend that pre-trial discovery of appraisers’ opinions, the facts underlying their opinions, and their complete records and reports cannot help but lead to the preparation of more honest and reliable reports by both parties in condemnation pro-



ceedings. The pre-trial exchange of expert opinions and reports is not only justified but demanded by the Federal Rules of Civil Procedure, by the mandate of *Hickman v. Taylor, supra*, and by common sense. The Government seeks to establish a restrictive rule for condemnation discovery which would be procedurally medieval. The District Court properly ruled that the questions propounded to the appraisers and the appraisers' records and reports were proper matters of discovery; and that the United States had willfully refused to comply with the court's order. The action was properly dismissed under Rules 37 (b) and 45 of the Federal Rules of Civil Procedure; and we respectfully submit that the judgment should be affirmed.

---

**II. THE GOVERNMENT WILLFULLY REFUSED TO OBEY THE COURT'S ORDER REGARDING DISCOVERY IN THE INSTANT CASE. IT WILLFULLY AND WITHOUT SUBSTANTIAL JUSTIFICATION OR ADEQUATE EXCUSE CAUSED WITNESSES TO DISOBEY SUBPOENAS DUCES TECUM. THE DISTRICT COURT HAD THE POWER AND PROPERLY EXERCISED ITS DISCRETION IN DISMISSING THE ACTION AND SETTING ASIDE ITS ORDER FOR DELIVERY OF POSSESSION.**

Despite the fact that the District Court had clearly ordered discovery of the experts' opinions, records, and reports and this Court had refused to permit an interlocutory appeal, the plaintiff chose to disobey the District Court's order and instructed the witnesses to refuse to answer the questions propounded to them at the depositions and to refuse to turn over their records and reports. The Assistant United States Attorney advised the District Court on the motion to



compel answers and to hold the witnesses in contempt that the witnesses would continue at the request of and the advice of the United States Attorney to decline to answer the questions. The action of the United States in refusing to comply with the District Court's order was a clear defiance of the order and in contempt of court.

Rule 37 (b) of the Federal Rules of Civil Procedure provides that if a party refuses to obey an order requiring him to answer designated questions or to produce any document or other thing for inspection, the court may strike the pleadings or parts thereof or dismiss the action or proceeding or any part thereof, or render a judgment by default against the disobedient party. Under Rule 37, dismissal for failure to comply is discretionary with the court. (*Craig v. Far West Engineering Co.*, 265 F.2d 251 (9th Cir., 1959), cert. den. 361 U.S. 816) To make pre-trial procedures effective, the District Courts must have full power to require complete discovery. (*Buffington v. Wood*, 351 F.2d 292 (3rd Cir., 1965)) The Federal Rules of Civil Procedure were designed to secure just, speedy, and inexpensive determination of every action; and a party may not ignore the plain mandate of these rules. (*United States v. Continental Cas. Co.*, 303 F.2d 91 (4th Cir., 1962)) The sanctions authorized by Rule 37 may be applied not only where there has been a wrongful intent to disobey the rule, but simply a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance. (*United States v. Continental Cas. Co.*, *supra*)

The Government is subject to the rules of discovery, just as any other litigant. (*Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 65 (1964)) As was stated in *Shenker v. United States*, 25 F.R.D. 96 at 98 (1960):

“There can be little dispute that the Government is not immune to this procedural process. Like any other party to a civil litigation the Government is bound by the same rules which apply to all other litigants including the Federal Rules of Civil Procedure and its discovery remedies.”

The Government as a litigant does not have a greater right to secrecy than a private litigant. (*Conway Import Co. v. United States*, 40 F.R.D. 5 (1966))

In *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (1950), an action by the United States against various defendants for violation of the Sherman Anti-Trust Law, the District Court dismissed the action for the Government's failure to comply with the court's order to produce for inspection documents requested by the defendants. The action by the plaintiff in the case at bar was no less a willful disregard and refusal to comply with the District Court's order; and the action was properly dismissed under Rules 37 (b) and 41 (b) of the Federal Rules of Civil Procedure.

In *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (1954), cited by appellant, the court stated:

“As plaintiff the Government is subject not only to orders of the court under Rule 34, but

also to the provisions of Rule 41 (b) that ‘For failure of the plaintiff . . . to comply with these rules or any order of court, a defendant may move for dismissal of an action. . . . (citations)’ (15 F. R. D. 224 at 232)

This was a condemnation proceeding and clearly indicates that the court may dismiss such an action where the Government fails to comply with the Federal Rules of Civil Procedure.

Appellant relies upon *United States v. Cobb*, 328 F.2d 115 (9th Cir., 1964). In that case, this court held that the District Court had no power to review the action of the Assistant Secretary of Agriculture, who made the estimate for the deposit made by the Government in connection with the filing of its declaration of taking. It is quite one thing to say that the court does not have the power to review an administrative decision made by the authorized administrative official, the Assistant Secretary of Agriculture. It is another matter to say that the court does not have the power to enforce its own rules, particularly when the Federal Rules of Civil Procedure clearly give the court the power to dismiss the action and the cases clearly hold that the Government is bound by these rules, just as any other party in civil litigation.

Rule 71 A(a) provides:

“The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.”

Nothing contained in Rule 71 A(a) prescribes the power of the court to enforce its orders in condemnation cases through the powers granted by Rule 37 (b) of the Federal Rules of Civil Procedure. The United States is not and should not be above the law. The Government in the instant case has chosen to willfully disobey the order of the District Court. The District Court under Rules 37 (b), 41 (b) and Rule 45, governing the power of the court to punish a contempt, had the power and properly exercised its discretion in dismissing the action and the declaration of taking. The District Court had jurisdiction and, we respectfully submit, properly exercised its jurisdiction. The action of the District Court was fully justified; and we respectfully request that the judgment be affirmed.

---

### CONCLUSION

The Fifth Amendment to the United States Constitution guarantees that no person shall be deprived of property without due process of law and, further, that private property will not be taken for public use without just compensation. The Government's disclosure that it frequently gets its appraisers to change their opinions and reports demonstrates the urgency for full and complete discovery in federal condemnation cases in order to ensure that "due process of law" and "just compensation" will not become hollow phrases. We can well understand why the officials, who are engaging in this shocking practice, wish to maintain a veil of secrecy around their appraisers in advance of trial; but this practice can-



not and should not be allowed to continue. The full light of discovery is needed, so the defendant, whose property is being taken by the Government will be afforded complete due process of law and be sure that he will receive "just compensation." Complete and mutual exchange of information through discovery is essential if the trial of a federal condemnation case is to truly be a search for truth, and justice is to be afforded for all.

For the reasons set forth above, we respectfully pray that the judgment be affirmed.

Dated, February 24, 1967.

Respectfully submitted,  
 C. RAY ROBINSON,  
 BLEDSOE, SMITH, CATHCART,  
 JOHNSON & ROGERS,  
*Attorneys for Appellee*  
*Horace Meyer.*

ROBERT A. SELIGSON,  
*Of Counsel.*

---

#### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. SELIGSON.





No. 21,127

---

In the United States Court of Appeals  
for the Ninth Circuit

---

UNITED STATES OF AMERICA, APPELLANT

v.

HORACE MEYER, ET AL., APPELLEES

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

---

REPLY BRIEF FOR THE UNITED STATES

---

EDWIN L. WEISL, Jr.,  
*Assistant Attorney General.*

CECIL F. POOLE,  
*United States Attorney,  
San Francisco, California 94102.*

A. LAWRENCE BURBANK,  
*Assistant United States Attorney,  
San Francisco, California 94102.*

ROGER P. MARQUIS,  
*Attorney, Department of Justice,  
Washington, D.C. 20530.*

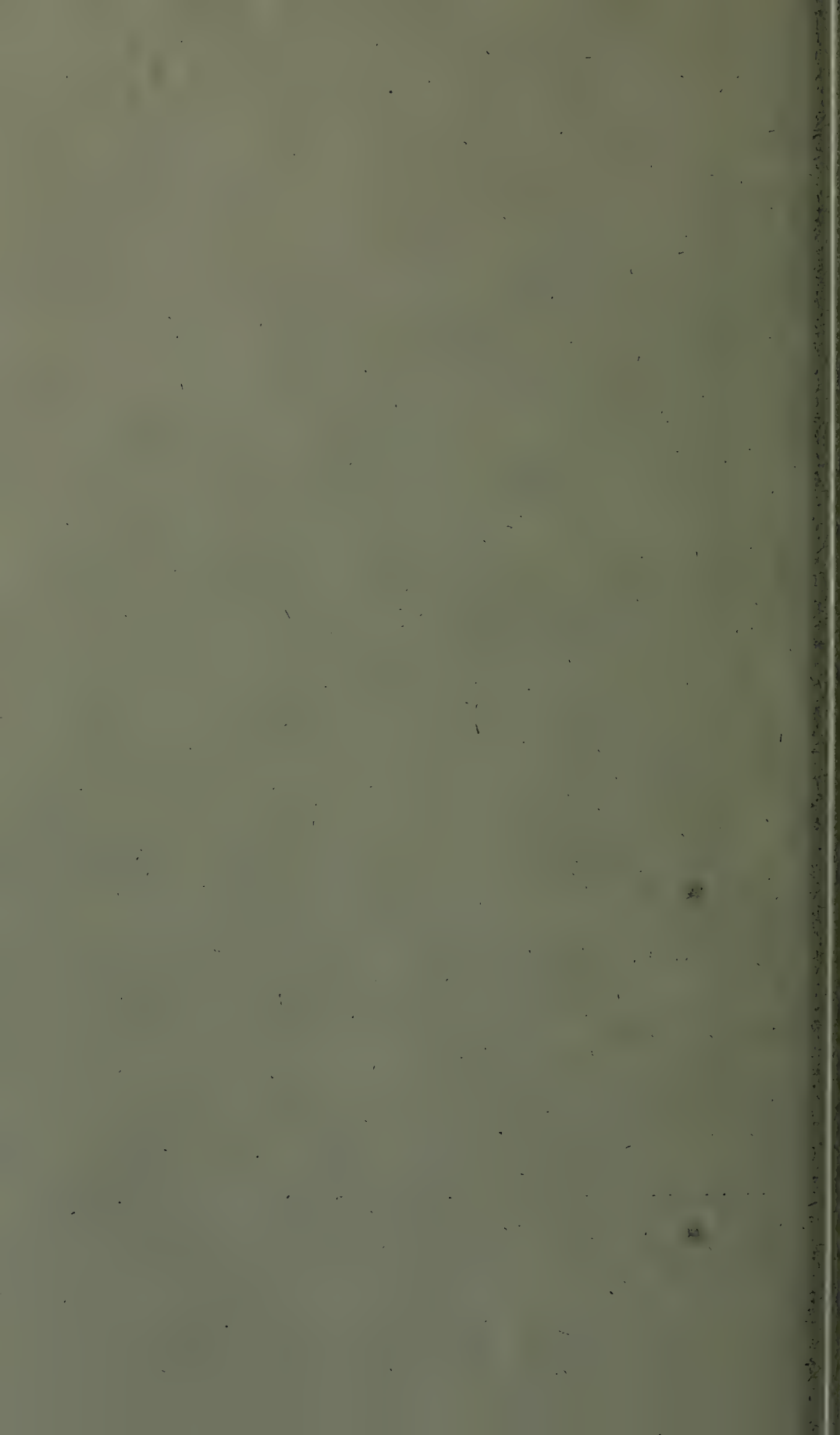
---

FILED

APR 12 1967

APR 14 1967

WM. B. LUCK, CLERK



# I N D E X

---

	Page
Part A. Appellee's argument that a party should be prejudiced by opinions of appraisers unaccepted and unapproved by the party lacks merit.....	1
Part B. Appellee fails to give valid answers to appellant's propositions.....	7
I. The federal discovery rules do not accord a party a right to compel revelation of everything he would like to know from his opponent or possible witnesses.....	7
II. Ground for discovery of the materials refused was not shown by appellee.....	9
A. Purely factual data was not refused.....	9
B. No good cause was shown for requiring discovery of the matters refused.....	9
C. The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case.....	10
III. The protective provisions of the discovery rules should preclude the unlimited discovery sought by appellee.....	12
A. The discovery here sought was unjust to the public.....	12
B. The discovery here sought would annoy and embarrass the appraisers.....	12
C. The "work product" principle of <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947), should preclude the discovery here sought.....	13
D. The purposes of the discovery rules will not be served by the discovery here ordered.....	17
IV. In any event, the district court had no jurisdiction to set aside the declaration of taking and dismiss the proceeding.....	18
Conclusion.....	19
Appendix.....	20

## CITATIONS

## Cases:

	Page
<i>Alltmont v. United States</i> , 177 F. 2d 971, cert. den., 339 U.S. 967-----	9, 10
<i>Atlantic Coast Line R. Co. v. United States</i> , 132 F. 2d 959-----	4
<i>Bergstrom Paper Co. v. Continental Ins. Co.</i> , 7 F.R.D. 548-----	16
<i>Broadway &amp; Ninety-Sixth St. Realty Co. v. Loew's, Inc.</i> , 21 F.R.D. 347-----	16
<i>Hickman v. Taylor</i> , 329 U.S. 495-----	13
<i>International Paper Company v. United States</i> , 227 F. 2d 201-----	4
<i>Ledwig v. United States Rubber Co.</i> , 23 F.R.D. 220---	16
<i>Oceanside Union School District v. Superior Court</i> , 58 Cal. 2d 180, 373 P. 2d 439-----	7
<i>Olson v. United States</i> , 292 U.S. 246-----	5, 11
<i>People ex rel. Dept. of Public Works v. Donovan</i> , 57 Cal. 2d 346, 369 P. 2d 1-----	8
<i>Russo v. Merck &amp; Co.</i> , 21 F.R.D. 237-----	16
<i>Sachs v. Aluminum Co. of America</i> , 167 F. 2d 570----	16
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104-----	7
<i>Seven-Up Bottling Company, Inc. v. United States</i> , 39 F.R.D. 1-----	17
<i>State of Washington v. United States</i> , 214 F. 2d 33, cert. den., 348 U.S. 862-----	3
<i>State v. Whitman</i> , 91 Ariz. 120, 370 P. 2d 273-----	8
<i>United States v. Certain Interests in Property, etc.</i> , 296 F. 2d 264-----	3
<i>United States v. Certain Parcels of Land, Etc.</i> , 15 F.R.D. 224-----	15
<i>United States v. Cooper</i> , 277 F. 2d 857-----	4
<i>United States v. Crance</i> , 341 F. 2d 161, cert. den., 382 U.S. 815-----	6
<i>United States v. Fort Smith River Develop. Corp.</i> , 349 F. 2d 522-----	6
<i>United States v. Honolulu Plantation Co.</i> , 182 F. 2d 172, cert. den., 340 U.S. 820-----	3
<i>United States v. Michoud Industrial Facilities</i> , 322 F. 2d 698, cert. den., 377 U.S. 916-----	4
<i>United States v. Miller</i> , 317 U.S. 369-----	2, 11
<i>United States v. Nysco Laboratories, Inc.</i> , 26 F.R.D. 159-----	17
<i>United States v. Pope &amp; Talbot, Inc.</i> , 293 F. 2d 822---	5



### III

#### Cases—Continued

	Page
<i>United States v. Runner</i> , 174 F. 2d 651-----	6
<i>United States v. Whitehurst</i> , 337 F. 2d 765-----	4
<i>United States v. 38 Cases, More or Less, Etc.</i> , 35 F.R.D. 357-----	17
<i>United States v. 158.76 Acres in Townshend, Vermont</i> , 298 F. 2d 559-----	4
<i>United States v. 900.57 Acres in Johnson and Logan Counties</i> , 30 F.R.D. 512-----	18
<i>United States v. 2,648.31 Acres of Land in Charlotte &amp; Halifax Counties</i> , 218 F. 2d 518-----	6
<i>Westchester County Park Commission v. United States</i> , 143 F. 2d 688, cert. den., 323 U.S. 726-----	2

#### Miscellaneous:

##### Federal Rules of Civil Procedure:

Rule 26-----	9
Rule 30(b)-----	10
Rule 34-----	9
Rule 71A(e)-----	10
<i>The Appraisal of Real Estate</i> , American Institute of Real Estate Appraisers (1951)-----	5



**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 21,127

UNITED STATES OF AMERICA, APPELLANT

*v.*

HORACE MEYER, ET AL., APPELLEES

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION*

---

**REPLY BRIEF FOR THE UNITED STATES**

---

**PART A. APPELLEE'S ARGUMENT THAT A PARTY SHOULD BE  
PREJUDICED BY OPINIONS OF APPRAISERS UNACCEPTED  
AND UNAPPROVED BY THE PARTY LACKS MERIT**

Throughout appellee's brief runs a series of assertions and assumptions as to the essential nature of the appraisal process in federal eminent domain which are clearly erroneous. Founded on these assertions are charges of concealment of the truth, misconduct on the part of government agents, concluding in the charge of "engaging in this shocking practice" (Br. 44). These charges are unwarranted. One basic assumption of this position is that it is reprehensible for a government attorney to review the work of appraisers, to refuse to present at the trial appraisals of which he does not approve or to cause modification

or changes in the report (cf. Br. 23-24, 30). The other basic assumption is that the appraisal process and the trial attorney's preparation are completely separate and unrelated (cf. Br. 22). Because of the error of both these assumptions, appellee's epithetical conclusions are invalid.

The assertion that the problem here is "a search for truth" (Br. 45) and the implication that the Government is seeking to conceal the truth are based on the premise that the objective is an ascertainable and definite fact. But, far from being a fact like whether the traffic light was red or green, or whether the claimant had a particular disease, in the ordinary case "assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. \* \* \* Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons." *United States v. Miller*, 317 U.S. 369, 374-375 (1943). "But that guess must have a rational foundation." *Westchester County Park Commission v. United States*, 143 F. 2d 688, 692 (C.A. 2, 1944), cert. den., 323 U.S. 726. It is through the expert appraisers that the material essential to inform the factfinder (jury, judge or commission) to make that guess is furnished.

An appraisal opinion that does not have a rational foundation is irrelevant to the case. It is the need to exclude such irrelevant matter that has led to many appellate decisions (and, of course, many more unappealed trial court rulings) rejecting appraisers'

testimony, especially in the last 25 years.<sup>1</sup> Thus, in *United States v. Certain Interests in Property, etc.*, 296 F. 2d 264, 268 (C.A. 4, 1961), the court said: "However, where the factfinder bases a finding on opinion testimony of an expert witness whose stated reasons for his opinion are patently unsound and without support in the record, the reviewing court should reject, as clearly erroneous, the finding based on such testimony." In *State of Washington v. United States*, 214 F. 2d 33 (C.A. 9, 1954), cert. den., 348 U.S. 862, this Court affirmed a judgment setting aside a verdict awarding substantial compensation for the taking of roads, saying (p. 43):

Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based. Opinion evidence in conflict with the physical facts, *United States v. Hill*, 8 Cir., 1933, 62 F. 2d 1022, 1025; *United States v. Thornburgh*, 8 Cir., 1940, 111 F. 2d 278, 280, is not substantial evidence, and may be disregarded.

In *United States v. Honolulu Plantation Co.*, 182 F. 2d 172 (C.A. 9, 1950), cert. den., 340 U.S. 820, judgments based on expert valuations were rejected because they actually represented business loss, not compensation for property taken, the Court speaking of disposition of "erroneous claims and theories of the experts" and stating (p. 178):

---

<sup>1</sup> The expansion of federal activities during and since World War II, especially as to need for valuable properties, has produced a tremendous development of federal eminent domain law which is still continuing.



Opinion evidence is not evidence of fact. The trier of fact is not bound to follow the expert. Based upon unwarranted theorems of the experts, the Judge found "severance damage" to the properties as a whole. Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings. [Footnotes (citations) omitted.]

Another example is that since offers are not relevant evidence under federal condemnation principles, the exclusion of an expert opinion based on owners' asking prices was affirmed in *Atlantic Coast Line R. Co. v. United States*, 132 F. 2d 959, 963 (C.A. 5, 1943). A few other examples of rejection of expert opinions because of mistaken legal theories or factual errors are *United States v. Whitehurst*, 337 F. 2d 765 (C.A. 4, 1964); *United States v. Cooper*, 277 F. 2d 857, 862 (C.A. 5, 1960); *International Paper Company v. United States*, 227 F. 2d 201, 205 (C.A. 5, 1955); *United States v. 158.76 Acres in Townshend, Vermont*, 298 F. 2d 559, 561 (C.A. 2, 1962); *United States v. Michoud Industrial Facilities*, 322 F. 2d 698 (C.A. 5, 1963), cert. den., 377 U.S. 916.<sup>2</sup>

It can hardly be said that, in directing exclusion of these experts' opinions, the courts were impeding "a search for truth," in appellee's words (Br. 45). Expert opinion is material to such a search only to the

---

<sup>2</sup> As these cases show, the question whether an expert is qualified is far different from the further question whether his opinion is properly based on fact and law so as to constitute substantial evidence of value under the federal standard.

extent that it is well founded in fact and law. Again, in these and the great mass of valuation decisions in federal condemnation law, when they reject appraisal evidence the appellate courts are directing appraisers to change their opinions and reports.<sup>3</sup> Appellee ignores the law in calling this a “shocking practice” (Br. 44).

These cases also illustrate the fact that the appraisal and legal aspects of the ascertainment of just compensation are intertwined and cannot be compartmented. The Supreme Court, in one of the leading cases on the subject, noted the connection in *Olson v. United States*, 292 U.S. 246 (1934), when it said (p. 257) that certain elements should be excluded from consideration “for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.” Legal and appraisal principles must coalesce and there must be cooperative effort and mutual understanding between the appraiser and the attorney. Moreover, neither appraisal principles nor federal rules of ascertainment of just compensation are static concepts, but both are in a development process recognizing increasing knowledge and new applications.<sup>4</sup> Since the valuation evidence is presented

---

<sup>3</sup> In *United States v. Pope & Talbot, Inc.*, 293 F. 2d 822 (C.A. 9, 1961), this Court directed remittitur of the amount of a particular item of depreciation in value testified to by the condemnnee’s witnesses.

<sup>4</sup> Illustrative of appraisal developments is the fact that “*The Appraisal of Real Estate*” by the American Institute of Real Estate Appraisers, one of the leading publications in the field,

through expert appraisers, it is only by adoption of approaches suggested by the attorney that such new developments may occur. One example is recent application of the rule excluding enhancement due to the project for which the land valued is taken. See *United States v. Crance*, 341 F. 2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815. Another example is the consideration to be given an increase in value of the remainder where only part of a tract of land is taken. *United States v. Fort Smith River Develop. Corp.*, 349 F. 2d 522 (C.A. 8, 1965).

Many elements of fact and law must be verified upon review before an attorney can approve of an appraisal as worthy of presentation to the court. In the Appendix, *infra*, we print a checklist for use by attorneys and appraisers which has been prepared by the Chief of the Appraisal Section of the Land and Natural Resources Division of the Department of Justice and used for some time.<sup>5</sup> Examples of "no" answers to almost any item on the list could be given. For example, as to Item 1, it was disclosed at the trial in *United States v. Runner*, 174 F. 2d 651 (C.A. 10, 1949), that what was valued as one tract of land actually was four tracts. In *United States v. 2,648.31 Acres of Land in Charlotte & Halifax Counties*, 218 F. 2d 518 (C.A. 4, 1955), the trial court was reversed

---

is now in its fourth edition, the original text being published in 1951. The preface to the third edition noted a 1957 survey which "indicated that rewriting, amplification, and some revision and expansion of the text was desirable to keep the material in line with new developments in appraisal thought."

<sup>5</sup> The details of this list have not been officially approved and it is circulated simply as a suggestion of matters to be verified.

for holding that the taking of a flowage easement was the equivalent of a fee and, hence, refusing to permit the Government to value merely a flowage easement.

Certainly it is the duty of the attorney to his client, if not to the court, and of government attorneys as public officials, to review carefully the appraisal reports and to eliminate errors of fact or law. This has not the remotest resemblance to illegal wiretapping, to which appellee makes comparison (Br. 25).

**PART B. APPELLEE FAILS TO GIVE VALID ANSWERS TO APPELLANT'S PROPOSITIONS**

**I. The federal discovery rules do not accord a party a right to compel revelation of everything he would like to know from his opponent or possible witnesses**

Appellee simply ignores this point. His brief makes no mention of the latest Supreme Court decision on this subject, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), which emphasizes the duty of the court to keep discovery within bounds. Appellee cites no authority supporting the unlimited discovery of unapproved appraisals and the complete files of the appraisers as ordered here. We think the lack of any limitation, of itself, requires reversal.

Much emphasis is placed on California cases. But the issue here is the federal rule. As appellee's own citation, *Oceanside Union School District v. Superior Court*, 58 Cal. 2d 180, 373 P. 2d 439 (1962), says (p. 189), a recent article "indicates that there are almost as many rules as there are jurisdictions which permit discovery." Certainly the federal rule should be given the same meaning within this Circuit, whether the question arises in Arizona or California. Ari-



zona has refused to require the disclosure of the names of persons who may have been consulted "but whose testimony is not intended to be used." *State v. Whitman*, 91 Ariz. 120, 125-126, 370 P. 2d 273, 277 (1962). Appellee's California citations, in fact, support our position here. His own quotation (Br. 18) from the *Oceanside* case, *supra*, says: "Assumedly, petitioner [the condemnor] believes that its appraisers have arrived at a fair market value." The next paragraph of the opinion said: "The only distinction between disclosure at trial and pretrial discovery is one of time." We have no such belief as to the unapproved appraisals here involved. And certainly we cannot have as to the appraisal not yet received. And it is far more than a mere matter of time to permit the hostile attorney to delve into all the notes and files of the appraisers, as does the order here. Contrary to the order here, the *Oceanside* case recognized limits upon discovery. It said (58 Cal. 2d at p. 192): "The claim of 'work product' is not an absolute bar to discovery, but is a circumstance to be considered by the trial court in exercising its discretion."<sup>6</sup> Here the

---

<sup>6</sup> Appellee says that *People ex rel. Dept. of Public Works v. Donovan*, 57 Cal. 2d 346, 369 P. 2d 1 (1962), held that a landowner could offer in evidence the appraisal given to the condemnor's attorney but not used. That issue is not here involved. In fact, the *Donovan* case sustained exclusion of the opinion of the appraiser and by dictum simply stated that the attorney-client privilege did not bar production of that witness' opinion. Nor does it appear that, as appellee apparently conceives (Br. 18), the rejected expert opinion was offered merely to discredit the condemnor's case. Rather, it was an offer by the condemnee as an expert opinion on the question of value. As we have noted (Opening Br. 36), the only federal appellate holding we know of concludes that the fact that the



trial court has abandoned any exercise of discretion in particular cases. But when a motion for discovery is made, "The rule contemplates an exercise of judgment by the Court, not a mere automatic granting of a motion." *Alltmont v. United States*, 177 F. 2d 971, 978 (C.A. 3, 1950), cert. den., 339 U.S. 967.

## II. Ground for discovery of the materials refused was not shown by appellee

### A. Purely factual data was not refused

Appellee seeks to stretch "facts" beyond any fair meaning of the word. He says (Br. 31): "Comparable sales are factual data." Whether a sale occurred is factual. But whether it is "comparable" is the very heart of the opinion dispute in most condemnation cases. Comparability, when speaking of real estate, is, of course, a matter of degree. It is the essence of the judgment of appraisers as to which elements of various sales may best be compared to various elements of the property to be valued. Review of such matter is one of the most important factors in testing the validity of appraisals (see Appendix, *infra*, p. 22-23).

### B. No good cause was shown for requiring discovery of the matters refused

Consistent with his position that discovery knows no limits and his silent rejection of the *Schlagenhauf* case (*supra*), appellee says there is no requirement of "good cause" when discovery takes the form of depositions under Rule 26, rather than the production of documents under Rule 34. But appellee's coun-

---

Government consulted but did not use particular experts "is not relevant evidence of value."

sel did not merely ask questions. He demanded appraisal reports and the many other documents representing the complete files of the appraisers. His counsel said (W. Tr. 39): "I would like copies of everything that is available to me. As a matter of fact, I would like everything."<sup>7</sup> Appellee's argument (Br. 33-34) that "good cause" was shown is simply another form of the trial court's assertion that the existence of an appraisal in a condemnation case constitutes good cause. Such reduction of the "good cause" limitation to a mere formality is forbidden by *Schlagenhauf*. Appellee abandons (Br. 34) the district court's theory that it can compel binding statements by the parties of the claims of value. Because of Rule 71A(e) (Opening Br. 32), the landowner can always produce, at the trial, the surprise of which appellee complains (e.g., Br. 36, 39).

**C. The material refused was not admissible evidence, its disclosure could not lead to the discovery of admissible evidence and it was not relevant to the subject matter of the case**

Appellee's answer to this point is the fallacious argument, dealt with in Point A, *supra*, that attorneys have no right to review appraisal reports for legal errors or for accuracy. Going further, appellee's counsel has taken the position that erroneous appraisals are nevertheless discoverable. The only

---

<sup>7</sup> Rule 30(b), F.R. Civ. P., should be applied to require the same substance as the "good cause" limitation. See *Schlagenhauf*, *supra*. Otherwise, the bizarre result is produced of making the extent of permissible discovery depend on whether we ask the witness to answer a question orally or produce his written answer. Cf. *Alltmont v. United States*, 177 F. 2d 971, 977-978 (C.A. 3, 1950), cert. den., 339 U.S. 967.

possible use of such material at a trial would be to create prejudice from the fact that an erroneous appraisal had been rendered or that errors of law or fact had been committed which required correction. To permit such matters to influence the result, violates the basic tenet that just compensation is measured by "market value *fairly determined*." *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. Miller*, 317 U.S. 369, 374 (1943).

Appellee's attempted justification of the demand for information as to settlements (Br. 30), ignores the basic reason for excluding evidence of such settlements at the trial, which is that they are based on various nonvaluation factors, so that they are not "fair indications of market value." (See Opening Br. 37-38.) Appraisals of other properties are even more remote and present all the problems of the present case plus questions as to how far those other properties are comparable. Appellee implies identity in referring to the "property next door" (Br. 30). But problems are obviously raised even as to such property as to quantity, identity of use, etc. And appellee's demand in the trial court was not limited to the "property next door." Injection of such considerations in the case simply leads further away from the question of value of the tract here condemned. Those appraisals are as irrelevant, so far as discovery is concerned, as might be appraisals made for private persons for nongovernmental purposes. Reason requires, we submit, that discovery be confined to matters relating to the land condemned. Here again, appellee charges the Government (Br. 30) with shopping for

better appraisals, on the fallacious premise that the correction of legal or factual errors represents dictation to the appraisers of the amount at which they should value the property.

### **III. The protective provisions of the discovery rules should preclude the unlimited discovery sought by appellee**

#### **A. The discovery here sought was unjust to the public**

Appellee's answer to this very important consideration is his vituperative attack upon the good faith of federal agents because of their reviews of appraisals for factual and legal errors.

#### **B. The discovery here sought would annoy and embarrass the appraisers**

Appellee's only answer (Br. 26-27) is the demand that appraisers should be held to a standard of perfection that is not required of anyone else, even attorneys. They should not, says appellee, be given an opportunity to correct such errors before their appraisals are made public and are subjected to the scrutiny of the hostile attorney. The argument is made that appraisals are desired "to enable the attorney to more properly evaluate his case and possibly achieve a settlement for his client" (Br. 27). Unapproved and perhaps erroneous appraisals could serve no such purpose. In any event, it seems somewhat contradictory for appellee's counsel to say that the Government should not be able to examine and secure the making of necessary corrections in its appraisers' reports but that, by discovery, appellee's counsel can have those appraisers correct his mistakes in evaluation "of his case." Moreover, we cannot find even attempted justification for delving into all the notes and other matters contained in the ap-



praisers' files which they demanded and the court ordered disclosed.

Appellee simply glosses over the problem of who is to pay the expert appraisers' fees. This is no small matter, in view of the charge of \$100 a day or more of trained and experienced appraisers and the unlimited nature of examination here ordered. The fact that, in this particular case, answers were refused to the unlimited inquiry sought by appellee because, in the Government's view, they went beyond all bounds of permissible discovery and in order to establish a test case, does not render the problem of compensation irrelevant when determining what discovery should be permissible. Nor does it justify appellee's questioning of "the propriety or sincerity of this argument" (Br. 32). Courts have not deemed consideration of the question improper. And we note the complete absence of an offer by appellee to compensate the appraisers for the time they spend on the discovery proceedings—proceedings which appellee's counsel say is designed in part to permit him "to more properly evaluate his case" (Br. 27). Why should his opponent be required to pay such expenses?

**C. The "work product" principle of *Hickman v. Taylor*, 329 U.S. 495 (1947), should preclude the discovery here sought**

Appellee, like the district court, rejects the "work product" principle of *Hickman* (Br. 21–22), even though his own authority, the *Oceanside* case, recognizes its relevance. (See *supra*, p. 8). Since *Hickman* does not rest on the attorney-client privilege, there is no logical reason why its principle does not apply to preclude discovery of the thought processes



and notes of the persons performing functions similar to those of an attorney. The second sentence of *Hickman* indicates this when it says (329 U.S. at p. 497): "Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care." The Court continued: "It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work."

And appellee ignores the unapproved and unaccepted nature of the appraisers' work involved in this case. All of the assertions made at page 22 of the brief as reasons for claimed discovery could equally be said as to the attorney's work. Thus, appellee actually is saying *Hickman* is wrong.

We think the several condemnation cases where federal district courts have considered the "work product" principle are correct (see Opening Br. 51). Appellee's attempted distinction of some of these decisions on the ground that *Hickman* enlarged the rules of discoverability, so that, to appellee, it knows no bounds, ignores the actual holding of *Hickman* and uses its language out of context. The unanimous holding of *Hickman* was that the discovery there ordered by the trial court was too broad and conviction for contempt of that order was reversed. The language of *Hickman* quoted by appellee, which speaks of a broad and liberal treatment of discovery rules (Br. 13-14), is immediately followed, in language not quoted by appellee, by consideration of the other side of the coin, the Court saying (329 U.S. at

p. 508): "But discovery, like all matters of procedure, has ultimate and necessary boundaries." The balance of the opinion is devoted to defining the boundary as applied to the problem there presented.

Appellee's attempted distinction (Br. 34-35) of some of the great majority of decisions which deny discovery of expert appraisal opinion in condemnation cases, on the ground they were decided before *Hickman*, lacks merit. Even the minority of three federal cases requiring some disclosure (Br. 17, 29, 31, 37-38) do not permit the unbridled exploration of the appraisers' personal files, as here ordered, or the revelation of the many collateral matters which would neither be admissible evidence or, when disclosed, would not lead to admissible evidence. None of these cases suggests that discovery will be ordered of unaccepted and unapproved appraisals. On the contrary, the only opinion on it assumes that discovery of appraisals by persons who will not be called at the trial should be denied. See *United States v. Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (S.D. Cal. 1954), and appellee's comments thereon (Br. 36-37). As we have noted (*supra*, p. 4), satisfaction with the qualifications of the appraiser is only the beginning point to determining whether his appraisal may properly be relied upon at the trial or in settlement negotiations.

Appellee also relies upon the article by Friedenthal (Br. 22-23) and upon decisions (Br. 19) which generalize about expert evidence, without distinction as to the kind of expert involved or the issue in the case. No court would think of telling a medical expert that, in determining whether a person had a particular

disease, a particular factor should be disregarded. But that is the result of rulings in eminent domain valuation (*supra*, pp. 3-5). Thus, one cannot generalize in this field, and, we submit, decisions concerning other kinds of experts in other kinds of cases are of little help in solving the present problem.<sup>8</sup> They, of course, give no consideration to the various factors that we have discussed. And the cases recognize the responsibility of the court to keep discovery within proper bounds, rather than the unlimited exploration of files here ordered.

Comment should be made on appellee's assertion that in other cases the Government "has taken a diametrically opposed position to the one which it takes in the case at bar" (Br. 19). The many condemnation cases we have cited (e.g., Opening Br. 33, 51) show a consistent position. Only one of the three cases cited by appellee to support his assertion (Br.

---

<sup>8</sup> *Sachs v. Aluminum Co. of America*, 167 F. 2d 570 (C.A. 6, 1948), involved an expert on X-ray metallography, where the objection made was the attorney-client privilege; *Bergstrom Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548 (D. Wis. 1947), concerned experts relating to the cause of an explosion in a manufacturing plant and, unlike the proceedings in this case, examination was limited; *Ledwig v. United States Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959), did not directly involve experts, but rather interrogatories concerning chemical analysis, etc., of rubber mine boots which caused injury; *Russo v. Merck & Co.*, 21 F.R.D. 237 (D. R.I. 1957), did not involve experts at all, but rather factual matters known only to the defendant as to method of production of blood plasma; and *Broadway & Ninety-Sixth St. Realty Co. v. Loew's, Inc.*, 21 F.R.D. 347 (S.D. N.Y. 1958), was a private antitrust case where the examination was of officers and agents of the defendants and where the court did rule out many matters.

19) involved valuation in any form.<sup>9</sup> That case, *Seven-Up Bottling Company, Inc. v. United States*, 39 F.R.D. 1 (D. Colo. 1966), was a tax refund case where the issue was valuation of corporate assets and the deposition of the Government's expert had already been obtained. The court recognized that (p. 2): "[T]he majority of the cases which have considered the subject have denied access, at least to the conclusions of an adverse expert witness." Almost all of the discussion is addressed to the question of the expense of the deposition, which the court reserved for later assessment as costs. This case has no tendency to support appellee's unlimited examination, including all of the appraisers' files or other matters here ordered, as to appraisals which have not been accepted and approved by the Government.

**D. The purposes of the discovery rules will not be served by the discovery here ordered**

Appellee disagrees (Br. 28-29) but he gives no answer, in reason or experience, to our view (Opening Br. 52-53) that an intelligent trial attorney will not stipulate to exclude detailed consideration of relevant factors which will be persuasive to the factfinder.<sup>10</sup> Appellee says that the view of *United States*

---

<sup>9</sup> *United States v. 38 Cases, More or Less, Etc.*, 35 F.R.D. 357 (W.D. Pa. 1964), and *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159 (E.D. N.Y. 1960), involved charges of misbranding under the Food and Drug Act, and the discovery sought was of doctors hired by a prospective distributor of the product (the *38 Cases* case) or of interrogatories concerning medical and scientific facts (*Nysco*).

<sup>10</sup> The fact (Br. 28-29) that this particular case as to wide-open discovery of appraisers has been delayed pending the test



v. 900.57 Acres in Johnson and Logan Counties, 30 F.R.D. 512 (W.D. Ark. 1962), that, based on 20 years of experience in trying thousands of tracts of land, discovery would greatly prolong the trial, is "unsound" (Br. 35). This is merely counsel's assertion, unsupported by authority or reasoning. We submit that the depositions here sought, involving a great mass of material which would not be admissible as evidence at the trial, cannot be dismissed as involving merely "a minor expense"<sup>11</sup> and that undue consumption of time is obvious (Br. 35).

**IV. In any event, the district court had no jurisdiction to set aside the declaration of taking and dismiss the proceeding**

Appellee does not answer this Court's holdings in the *Carey* and *Hayes* cases and the specific language of the Declaration of Taking Act. And the explicit notes of the rulemakers, that the rules are not intended to modify that Act, are also ignored. To say that the United States is subject to the rules of discovery (Br. 42) does not establish an amendment to the Declaration of Taking Act empowering the court to revest in the condemnee title which has vested in the United States under a valid declaration of taking.

---

has no bearing on the general question whether the time of the courts and counsel would be saved by the discovery sought.

<sup>11</sup> If that is the case, appellee should have no serious objection to paying it.



## CONCLUSION

It is submitted that the judgment below should be reversed.

Respectfully submitted.

EDWIN L. WEISL, Jr.,

*Assistant Attorney General,*

CECIL F. POOLE,

*United States Attorney,*

*San Francisco, California 94102.*

A. LAWRENCE BURBANK,

*Assistant United States Attorney,*

*San Francisco, California 94102.*

ROGER P. MARQUIS,

*Attorney, Department of Justice,*

*Washington, D.C. 20530.*

APRIL 1967.

## CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROGER P. MARQUIS,

*Attorney, Department of Justice,*

*Washington, D.C. 20530.*



## APPENDIX

### DEPARTMENT OF JUSTICE, LAND AND NATURAL RESOURCES DIVISION, APPRAISAL ANALYSIS

For Use by Attorneys and Appraisers

Name of Appraiser:

For What Agency:

Identification of Property (Civil No., Tract, etc.):

INSTRUCTIONS: Items not applicable, so indicate by (N/A) in negative blank. Use reverse side to explain all items marked "No". If 13 c. is marked "Yes" indicate action taken.

#### 1. CAPTION (Compare with Declaration of Taking or Complaint)

- |                           |              |                |
|---------------------------|--------------|----------------|
| a. Project and Parcel No. | Correct_____ | Incorrect_____ |
| b. Owners Name            | Correct_____ | Incorrect_____ |
| c. Legal Description      | Correct_____ | Incorrect_____ |
| d. Total Area of Property | Correct_____ | Incorrect_____ |
| e. Area Acquired          | Correct_____ | Incorrect_____ |
| f. Area of Remainder      | Correct_____ | Incorrect_____ |

#### 2. EFFECTIVE DATE OF APPRAISAL

- |  |          |         |
|--|----------|---------|
| a. Coincides with D of T                             | Yes_____ | No_____ |
| b. Does not coincide with D of T but is satisfactory | Yes_____ | No_____ |

#### 3. PURPOSE OF THE APPRAISAL

- |  |          |         |
|--|----------|---------|
| a. Definition of value compatible with federal law | Yes_____ | No_____ |
| b. Estate appraised correct                        | Yes_____ | No_____ |
| c. Taking accurately defined                       | Yes_____ | No_____ |

## 4. METHOD OF APPRAISAL

- a. Appraisal method and technique compatible with appraisal's purpose and premise Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Before and after approach in partial taking supported Yes\_\_\_\_\_ No\_\_\_\_\_
- c. Omission of one or more value approaches justified Yes\_\_\_\_\_ No\_\_\_\_\_
- d. Were improvements and interests (mineral, gas, etc.) evaluated based on their contribution to the whole Yes\_\_\_\_\_ No\_\_\_\_\_
- e. Salvage value of improvements and growing crop values considered Yes\_\_\_\_\_ No\_\_\_\_\_

## 5. PROPERTY DESCRIPTION

- a. Land description—including soil types, topography, etc. Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Improvements—identified, located and described Yes\_\_\_\_\_ No\_\_\_\_\_
- c. Minerals, gas, oil, timber and growing crops identified Yes\_\_\_\_\_ No\_\_\_\_\_
- d. Description of property before and after taking Yes\_\_\_\_\_ No\_\_\_\_\_

## 6. HIGHEST AND BEST USE

- a. Set forth and justified Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Alternatives discussed Yes\_\_\_\_\_ No\_\_\_\_\_
- c. Highest and best use after the taking set forth and justified Yes\_\_\_\_\_ No\_\_\_\_\_

## 7. MARKET DATA

- a. Cost data justified and supported Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Depreciation, including physical, functional and economic obsolescence defined, analyzed and supported Yes\_\_\_\_\_ No\_\_\_\_\_

- c. Income, expense and capitalization rates analyzed and supported Yes\_\_\_\_\_ No\_\_\_\_\_
- d. Capitalization technique analyzed and supported Yes\_\_\_\_\_ No\_\_\_\_\_
- e. Comparable sales verified, described, analyzed and related to subject property Yes\_\_\_\_\_ No\_\_\_\_\_
- f. All sales reported whether or not comparable Yes\_\_\_\_\_ No\_\_\_\_\_
- 8. DAMAGES AND OFFSETTING BENEFITS
  - a. Appropriately outlined and discussed Yes\_\_\_\_\_ No\_\_\_\_\_
  - b. Adequately analyzed and supported Yes\_\_\_\_\_ No\_\_\_\_\_
  - c. According to federal law Yes\_\_\_\_\_ No\_\_\_\_\_
- 9. CORRELATION AND CONCLUSION
  - a. Appropriate discussion Yes\_\_\_\_\_ No\_\_\_\_\_
  - b. Conclusion sound and convincing Yes\_\_\_\_\_ No\_\_\_\_\_
  - c. Mathematical computations are correct Yes\_\_\_\_\_ No\_\_\_\_\_
- 10. CERTIFICATION
  - a. Standard clauses included Yes\_\_\_\_\_ No\_\_\_\_\_
  - b. Effective date of valuation established Yes\_\_\_\_\_ No\_\_\_\_\_
  - c. Appraised values set forth Yes\_\_\_\_\_ No\_\_\_\_\_
  - d. Signed Yes\_\_\_\_\_ No\_\_\_\_\_
- 11. EXHIBITS
  - a. Appropriate pictures Yes\_\_\_\_\_ No\_\_\_\_\_
  - b. Date of pictures established Yes\_\_\_\_\_ No\_\_\_\_\_
  - c. Map showing subject and comparables Yes\_\_\_\_\_ No\_\_\_\_\_
  - d. Plat plan, survey and map of area Yes\_\_\_\_\_ No\_\_\_\_\_



12. QUALIFICATIONS OF APPRAISER

- a. In report Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Well qualified Yes\_\_\_\_\_ No\_\_\_\_\_

13. GENERAL

- a. Would appraiser be used as witness Yes\_\_\_\_\_ No\_\_\_\_\_
- b. Does Government have other appraisals Yes\_\_\_\_\_ No\_\_\_\_\_
- c. Are additional appraisals warranted Yes\_\_\_\_\_ No\_\_\_\_\_

FEB 20 1967

NO. 21131 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR. ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

FILED

FEB 20 1967

WM B LUCK CLERK

CHARLES A. LAUFER

14120 Victory Boulevard  
Van Nuys, California

Attorney for Appellant



NO. 21131

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

CHARLES A. LAUFER

14120 Victory Boulevard  
Van Nuys, California

Attorney for Appellant





## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
STATEMENT OF THE CASE	1
EVIDENCE PRESENTED ON DEFENDANT'S MOTION TO SUPPRESS	4
SPECIFICATION OF ERRORS RELIED UPON	34
ARGUMENT	35
I      THE ARREST OF THE DEFENDANT WAS UNLAWFUL.	35
II     THE EVIDENCE SPECIFIED IN THE INDICT- MENT WAS OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE.	39
III    THE DEFENDANT WAS DENIED THE RIGHT TO COUNSEL.	42
CONCLUSION	44
CERTIFICATE	45



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 977, 12 L.Ed.2d 1758	2, 42, 43
People v. Burke, 47 Cal.2d 45, 301 P.2d 24	41
People v. Martin (1964), 225 Cal.App.2d 91, 36 Cal.Rptr. 924	37
People v. Michael, 45 Cal.2d 751, 290 P.2d 852	41
United States v. Helbock, 76 F.Supp. 985	35
United States v. Lerner, 100 F.Supp. 765	41
Ward v. United States, 316 F.2d 113 (1963)	35, 36

### Constitution

United States Constitution:	
Sixth Amendment	43

### Statutes

California Penal Code, §837	35, 37, 38
California Penal Code, §847	2, 36, 38
Title 18, United States Code, §1709	1
Title 18, United States Code, §5010(a)	1
Title 28, United States Code, §1291	4
Title 28, United States Code, §1294	4
Title 39, United States Code, §903	39, 40
Title 39, United States Code, §903(3)	40
Title 39, United States Code, §3523(2)(k)	35



44 Cal. Jur. 2d 342

41





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S BRIEF

---

STATEMENT OF THE CASE

This is an appeal by Rein Neggo, Jr., the defendant in the District Court, from a judgment, adjudging said defendant guilty of embezzling mail. The defendant was found guilty of violating Title 18, United States Code, Section 1709. The defendant was tried and found guilty of having embezzled the mail specified in the indictment. His sentence was suspended and he was placed on probation for a period of two years, pursuant to Title 18, United States Code, Section 5010(a). Prior to the trial, the defendant duly noticed, filed and served his motion for an order to suppress the evidence specified in the indictment. Defendant based his motion



upon the following grounds:

- (1) That the evidence specified and alleged in the indictment was unlawfully obtained;
- (2) That the defendant's arrest was unlawful;
- (3) That the defendant was denied the right to counsel within the meaning of Escobedo v. State of Illinois.

Upon the hearing of the motion prior to the actual trial itself, the defendant contended: (1) that the arresting officers, who were United States Postal Inspectors, had no right to make an arrest under federal law; (2) that the arrest was not made legally, by the Postal Inspectors, as private citizens under the laws of the State of California; (3) that the search of the defendant's dwelling, subsequent to the arrest, and the seizure of the evidence in said dwelling, was unlawful under federal law; (4) that the search and seizure, after the making of the arrest, was unlawful because the arrest itself was unlawful; (5) that federal law expressly prohibits Postal Inspectors from searching a private dwelling; (6) that the purported consent of the defendant to the search and seizure was not free nor voluntary; (7) that the Government's failure to comply with Section 847 of the California Penal Code invalidated the arrest.

The defendant's motion was supported by his affidavit, and points and authorities duly filed and served with the Court and upon the Government.

Defendant's motion to suppress the evidence came on duly to be heard prior to the actual trial itself, based upon his affidavit and the points and authorities filed in support thereof, and upon the





affidavits and points and authorities filed by the Government. At the time said motion was heard, the arresting officers, United States Postal Inspectors, were duly cross-examined by defendant's counsel.

The District Court denied defendant's motion to suppress and the defendant was then tried for the offense charged. At the time of the trial, the defendant objected to the introduction of the evidence specified in the indictment on the same grounds as were used to support his motion to suppress the evidence, which objection was overruled. To facilitate a speedy trial, a stipulation was entered into between the Government and the defendant, which was expressed by the Court on page 104 of Reporter's Transcript, commencing with line 10 through line 25, as follows:

"THE COURT: All right. Then it is stipulated that the defendant objects during the course of trial to the receiving in evidence of all matters raised -- all matters objected to in his motion to suppress, which has heretofore been heard by the court, and it is stipulated that the affidavits heretofore filed by the defendant and by the Government be considered in connection with the question of the admissibility of such evidence, and that the affidavits be treated as the direct testimony of the witness and that all oral testimony given in connection with the hearing on the motion to suppress shall be deemed to be evidence in this cause for the purpose of ruling upon



the admissibility of evidence, and all objections heretofore made by the defendant in connection with this hearing, upon the hearing of his motion to suppress, are deemed to have been made during the course of the trial of the cause."

The stipulation so expressed by the Court was duly stipulated to and accepted by the Government and by the defendant [Clk. Tr. p. 105, lines 1-5].

The appellate jurisdiction of the Court of Appeals is invoked by the defendant in accordance with Title 28, Sections 1291 and 1294 of the United States Code.

**EVIDENCE PRESENTED ON DEFENDANT'S  
MOTION TO SUPPRESS**

---

The evidence presented at the hearing on defendant's motion to suppress the evidence specified in the indictment, consisted of defendant's affidavit in support of his motion and counter-affidavits filed by the Government of Stan H. Jensen and Thomas B. Johnson, the arresting Postal Inspectors. For purposes of this appeal, defendant's affidavit will not be discussed for the reason that the Trial Court obviously did not consider its contents. Defendant's discussion will be limited to the affidavits of the arresting Postal Inspectors and their testimony on cross-examination to establish that even if the Court elected to totally disregard the defendant's affidavit, it was bound, as a matter of law, to suppress the evidence specified in the indictment on the basis of the affidavits of the



Postal Inspectors and their testimony on cross-examination.

The affidavit of Stan H. Jensen, filed on April 1, 1966, appears on page 20 of the Clerk's Transcript on Appeal. The affidavit of Thomas B. Johnson, filed April 1, 1966, appears on page 24 of the Clerk's Transcript on Appeal. For the purpose of giving this Court the chronology of the events leading up to the defendant's arrest, the contents of the affidavit of Thomas B. Johnson will be first discussed.

Mr. Johnson's affidavit reads as follows:

"THOMAS B. JOHNSON, being first duly sworn, deposes and says:

"1. That affiant is an Investigative Aid, employed by the Postal Inspection Department, United States Post Office Department;

"2. That on January 27, 1966, affiant was made aware by analysis and charting that reported losses of letter mail indicated a possibility that REIN NEGGO, JR., was stealing mail;

"3. That on January 27, 1966, affiant was informed by George Clark that a test letter to one Kathy Prindle, 6810 Vantage, North Hollywood, was placed in the case used by temporary substitute carrier REIN NEGGO, JR.;

"4. That the address on Vantage was a fictitious and non-existent address;

"5. That at approximately 9:20 A. M.,





affiant personally observed REIN NEGGO, JR., start delivering letters on Vantage Street;

"6. That at approximately 9:10 A. M., affiant drove to the mail box at the intersection of Bellingham and De Hougne, where two test collection letters containing money, one addressed to the Foreign Missions Fund and the other to the Disabled American Veterans were deposited;

"7. That the mail box at the intersection of Bellingham and De Hougne was known by affiant to be serviced by REIN NEGGO, JR.;

"8. That affiant made a subsequent check of the mail box at Bellingham and De Hougne which check disclosed that the two test collection letters had been picked up;

"9. That affiant kept REIN NEGGO, JR., under surveillance until 12:05 P. M. until affiant lost track of NEGGO in traffic;

"10. That at approximately 12:20 P. M., affiant observed NEGGO at his home carrying his uniform;

"11. That affiant, along with Postal Inspector Stan Jensen observed REIN NEGGO, JR., return to work at the Victory Center Annex;

"12. That affiant and Postal Inspector Jensen were unable to locate any of the three test letters in the



Victory Center Annex;

"13. That affiant made Postal Inspector Jensen aware of all the details of his investigation on January 27, 1966;

"14. That at 4:20 P.M., affiant and Inspector Jensen approached REIN NEGGO, JR., as he was about to enter his car after departing from work at which time Inspector Jensen showed NEGGO his identification as a postal inspector;

"15. That affiant heard Inspector Jensen ask NEGGO whether he had returned all of his undeliverable mail to which NEGGO replied that he had;

"16. That affiant went inside the Post Office and was unable to locate any of the test mailings;

"17. That affiant returned and after informing Inspector Jensen that he could not locate the three test letters heard Inspector Jensen advise REIN NEGGO, JR., that he had the right to remain silent, the right to an attorney and that anything he might say could be used against him;

"18. That affiant asked NEGGO if he had any coins with him and that NEGGO voluntarily handed some coins to affiant and that among these coins was a marked .50 cents coin which had been enclosed in the test letter addressed to the Disabled American Veterans;





"19. That affiant overheard Inspector Jensen ask NEGGO where the rest of the stolen money and mail was and that NEGGO stated that he had some at his home;

"20. That affiant heard Inspector Jensen then tell NEGGO that he was being placed under arrest for theft of mail;

"21. That affiant observed Inspector Jensen look through NEGGO's car searching for any stolen mail;

"22. That affiant overheard Inspector Jensen ask NEGGO if they could go to his house to recover the stolen mail and that NEGGO gave affiant and Inspector Jensen permission to accompany him to his house; and

"23. That affiant drove with Inspector Jensen and REIN NEGGO, JR., to NEGGO's home."

The affidavit of Stan H. Jensen contains the following:

"STAN H. JENSEN, being first duly sworn, deposes and says:

"1. That he is a Postal Inspector for the United States Post Office Department;

"2. That at approximately 1:45 P. M. affiant met with Investigator Thomas B. Johnson at the Victory Center Annex Post Office in North



Hollywood, California;

"3. That affiant was told by Johnson that three test letters had been placed in the mails to test the honesty of temporary carrier Rein Neggo, Jr.;

"4. That affiant was made aware that the test letters were unaccounted for;

"5. That at 4:20 P. M. affiant approached Neggo as Neggo was about to enter his car and asked him some questions regarding what he had done with his undeliverable mail;

"6. That affiant showed Neggo his identification as a Postal Inspector;

"7. That affiant dispatched investigative aid Johnson to look in Neggo's case for the undeliverable mail;

"8. That after being informed by Johnson that the undeliverable test letters couldn't be located, affiant advised Neggo that he had the right to remain silent, the right to an attorney and that anything he said might be used against him;

"9. That affiant asked Neggo if he had any currency in his possession and Neggo replied that he hadn't;

"10. That affiant then asked Neggo if he had any coins in his possession, at which point Neggo voluntarily handed over some coins to investigative



aid Johnson who determined that one of the coins was a marked \$. 50 (fifty cents) piece which had been enclosed in the test letter addressed to the Disabled American Veterans;

"11. That affiant then asked Neggo where the rest of the money and mail was and that Neggo replied that it was at his house;

"12. That affiant then asked Neggo's permission to look through his car which permission was granted;

"13. That affiant then informed Neggo that he was under arrest and that he could call an attorney if he wanted to;

"14. That affiant then asked Neggo if they could go to his house to recover the rest of the stolen money and mail;

"15. That Neggo told affiant that he could come to his home and he would turn over the stolen mail and money;

"16. That affiant then proceeded to drive with Rein Neggo, Jr. and Thomas B. Johnson to the home of Rein Neggo, Jr.;

"17. That upon parking in the driveway of Neggo's home, affiant was led by Neggo to the garage where Neggo opened the garage door;

"18. That affiant went into the garage and





observed several envelopes lying on a dresser;

"19. That Neggo gathered some of the envelopes and handed them to affiant and that affiant gathered some envelopes himself;

"20. That after Neggo had turned over the letters to affiant in the garage Neggo stated that the house belonged to his parents, that the garage was a family room and that maybe affiant should leave;

"21. That affiant then left the garage and stood in the walk-way between the garage and Neggo's house while Neggo voluntarily went inside his house and returned with ten (10) one-dollar bills;

"22. That seven of these bills had test marks on them and serial numbers which matched a pre-recorded list;

"23. That affiant then took Neggo back to the Victory Center Annex and again advised him that he had a right to call an attorney;

"24. That affiant asked Neggo if he would furnish a written statement and that Neggo refused to do so, stating that he would like to talk with his attorney;

"25. That Neggo told affiant that he would appreciate it if he could be allowed to be released on his own recognizance until noon the next day as he had an appointment to see the Dean at Cal Tech regarding



admission as a student;

"26. That affiant allowed Neggo to leave on his own recognizance if he promised to return to affiant's office the next day to be arraigned before the United States Commissioner;

"27. That Neggo did in fact leave by himself and that he voluntarily returned to affiant's office the next day."

On cross-examination of Mr. Jensen, the following evidence was testified to:

"Q. Thank you. As you approached Mr. Neggo's car did you show Mr. Neggo your official identification?

"A. Yes, I did.

"Q. All right. Did you then inform Mr. Neggo that he was under arrest, as you were approaching him?

"A. No, I did not.

"Q. All right. Did you then have a conversation with Mr. Neggo?

"A. Yes.

"Q. And you had asked him what he had done with the undelivered mail, did you not?

"A. Yes.

"Q. Or undeliverable mail?





"A. That was part of the conversation, yes.

"Q. And he then told you that it was in the building, that he had left it in his case, did he not?

"A. Yes.

"Q. All right, sir. Up to that point he did not tell you that he took any mail, did he?

"A. No.

"Q. All right. You then dispatched your associate, Mr. Johnson, to the building, did you not?

"A. Yes.

"Q. And, by the way, how far is the parking lot wherein you and the defendant were located in relation to the actual post office building, in terms of feet yards or meters?

"A. Well, there is an alleyway. It is about 20 feet wide, I would say, and possibly 30 feet from where we were standing to the back of the building, as far as I --

"Q. Mr. Johnson then entered the building, is that correct?

"A. Yes.

"Q. While Mr. Johnson -- when Mr. Johnson left you and Mr. Neggo and walked to the building and then returned, how much time had elapsed, sir?

"A. Five minutes maybe.



"Q. Five minutes?

"A. As far as I can remember. It may have been more, it may have been less. I estimate five minutes.

"Q. And you were at that time talking with the defendant?

"A. Yes.

"Q. Up to that point, as I understand it, you did not inform him that he was under arrest, did you?

"A. No.

"Q. Prior to this time, prior to the time that Mr. Johnson returned, did you see the defendant take any mail? Did you physically see the defendant take any mail?

"A. No.

"Q. Did anyone tell you prior to that time that they had seen the defendant take any mail?

"THE COURT: Do you mean prior to the time that he first spoke to the defendant on this occasion?

"MR. LAUFER: Yes, sir.

"A. No.

"Q. All right, sir. Did you intend to arrest Mr. Neggo when you first approached the car?

"A. No.

"Q. You did not then know or have grounds



to believe that he had taken any mail, did you?

"A. I wasn't certain.

"THE COURT: May I have that answer?

"(Answer read.)

"MR. LAUFER: May I proceed, your Honor?

"THE COURT: Yes.

"Q. BY MR. LAUFER: You suspected that he may have, is that it?

"A. Yes.

"Q. And you were not certain because the mail, the undeliverable mail, was accessible to not only Mr. Neggo but to various people in the Post Office Department in the building, were you not?

"MR. GLASSMAN: Objection, your Honor, calling for a conclusion of the witness.

"THE COURT: Well, you can ask him if he knows.

"A. I didn't know that it was accessible to others. I knew that it had been inserted in Mr. Neggo's mail.

"Q. BY MR. LAUFER: Let me ask you this question, sir. Did you physically visit the spot where the mail was inserted by Mr. Neggo prior to the conversation we just talked about?

"THE COURT: Let's see. May I have that question?





(Question read.)

"THE COURT: Inserted by Mr. Neggo?

"MR. LAUFER: Yes. You see, your Honor, I am referring to undeliverable mail. When it is returned by the carrier it is placed in a certain spot.

"THE COURT: All right.

"MR. LAUFER: What I am trying to ascertain is whether this witness prior to discussing this matter with Mr. Neggo had occasion to visit the spot in the building wherein the mail is deposited by the carriers when it is undeliverable.

"A. No, I had not. I had not personally visited that very spot, no.

"Q. Are you familiar, sir, with the setup in the Post Office Department as to what procedure they use in depositing mail?

"A. Yes.

"Q. It is not under lock and key, is it?

"A. No.

"Q. The man in charge, his immediate supervisor would have access to it, would he not?

"A. Yes.

"Q. The other carriers would, would they not?

"A. Yes.

"THE COURT: Is this a branch post office?



"THE WITNESS: This is the carrier unit of the North Hollywood Post Office at Victory Center.

"THE COURT: Do you know how many carriers there were on duty there that day?

"THE WITNESS: I don't know. I would assume there might have been 30.

"THE COURT: And do you know the hours at which they returned that day?

"THE WITNESS: I observed carriers coming in there between the hours of possibly 1:30, 2:00 o'clock and 3:30, 4:00, thereabouts.

"THE COURT: When did you observe Mr. Neggo coming in that day?

"THE WITNESS: I observed him come back to the station, or to the carrier unit, about 2:40 P. M.

"THE COURT: And what time did you first speak to him that day?

"THE WITNESS: I would estimate about 4:20, 4:15 to 4:20.

"THE COURT: You may proceed, Mr. Laufer.

"MR. LAUFER: Thank you, your Honor.

"Q. So as between the time that he came in and the time that he left there were numerous carriers and postal employers in this area in the building, were there not, sir?

"A. Yes.





"Q. So that any one of them, there was a possibility at least, that any one of them could have taken it, isn't that so?

"A. If the letter had been available to them, yes.

"Q. But you didn't know that they weren't available to them, did you, at the time you first approached Mr. Neggo?

"A. Well, I had been told by Mr. Johnson and the supervisors that the letter was placed in Mr. Neggo's mail and that he had it and taken it out for attempted delivery, or whatever he was going to do with it. So, as far as I knew, he was the last employee to have it in his hands.

"Q. All right, sir. Did you check Mr. Neggo or the slot wherein he would ordinarily deposit this mail?

"THE COURT: That is, upon his return?

"MR. LAUFER: Upon his return.

"A. I did not personally do so.

"Q. Did anyone else?

"A. Yes.

"THE COURT: Who, if you know? Without telling what they said, did someone tell you he had?

"THE WITNESS: Yes. Mr. Johnson told me and Mr. George George Clark and Mr. Harry Ross,



the latter two being supervisors.

"MR. LAUFER: May I proceed, your Honor?

"THE COURT: Yes.

"Q. BY MR. LAUFER: After Mr. Neggo came in numerous people were coming and going, were they not, in the post office?

"A. Yes.

"Q. So any one of these people could have, at least there was a possibility, could have taken -- strike that -- had access to this spot wherein the defendant would ordinarily deposit the mail, would he not?

"MR. GLASSMAN: Objection, your Honor. It has been asked and answered on at least two prior occasions.

"THE COURT: Yes. He has already answered it.

"Q. BY MR. LAUFER: Yet after having discussed this matter with your associates, Messrs. Johnson and Clark, you didn't really know that this defendant took the mail, did you, before you talked to him?

"A. I didn't know for sure until I talked to him, no.

"THE COURT: When did you talk to him?

"Withdraw that. Go ahead, counsel.



"Q. BY MR. LAUFER: But you say you suspected him?

"A. Yes.

"Q. Did you suspect anybody else?

"A. No.

"Q. Why did you suspect him?

"A. We had some background information in my office. We chart all the losses on the various post offices, and incident to the charting his name appeared as the employee who had handled a number of letters that had not shown up, that had been lost, and therefore he became a candidate for possible testing as a --

"Q. Possible testing?

"A. -- as a suspect.

"Q. But prior to that time, at no time did you ever catch, see or hear about this defendant stealing mail, did you?

"THE COURT: He has testified as to his background information on it, counsel. This is not a jury trial.

"MR. LAUFER: I know.

"THE COURT: I assume that what he said is what was his basis. He didn't say that he caught him stealing mail prior to that time." [Rep. Tr. p. 29, line 7 to p. 37, line 7.]





"Q. BY MR. LAUFER: I am reading from point No. 8 of your affidavit, on page 2, and I quote:

" 'That after being informed by Johnson that the undeliverable test letters couldn't be located, affiant advised Neggo that he had the right to remain silent, the right to an attorney and that anything he said might be used against him. '

"Did you at that time tell him he was under arrest?

"A. I didn't tell him he was under arrest in the same breath that I advised him of his rights. I told him, I advised him of his rights, and at that time I said, 'It looks like we have a criminal matter here and, therefore, you are entitled to know your rights', and I told him the rights as stated in the affidavit, and then I asked him if he would produce the contents of his pockets, which he did.

"MR. LAUFER: May I have just a moment, if your Honor please?

"THE COURT: Yes.

"Q. BY MR. LAUFER: Point No. 10 is:

" 'That affiant then asked Neggo if he had any coins in his possession, at which point Neggo voluntarily handed over some coins to investigative aide Johnson who determined that one of the coins was a marked \$.50 piece which had been enclosed



in the test letter addressed to the Disabled American Veterans.'

"He was under arrest at that time, was he not, Mr. Jensen?

"A. As soon as I identified the coin at that time I told him that he was under arrest for theft of mail.

"Q. But that was after, after you had stated in point No. 8 that you had advised him to remain silent and --

"THE COURT: Of his right to remain silent.

"MR. LAUFER: Right.

"Q. So that it wasn't until he emptied his pockets and handed over the money and his wallet that you told him he was under arrest, isn't that so?

"A. Yes. When he handed the evidence to us and we identified it then we told him he was under arrest." [Rep. Tr. p. 41, line 4 to p. 42, line 19.]

"Q. BY MR. LAUFER: After the car was searched and after the arrest was made, did you in substance make a statement to the defendant, 'Now let's go to the house and get the mail, or get the letters'?

"A. I don't know that I said it that way. I did ask him his permission. I asked him if he would





"Q. Who did?

"A. Mr. Johnson did.

"Q. Did Mr. Johnson inform you that he had seen the defendant take any mail?

"A. No. He didn't say he had seen him take any mail." [Rep. Tr. p. 49, lines 13-21.]

"Q. BY MR. LAUFER: With reference to paragraph 5, and I quote:

" 'That at 4:50 p. m. affiant approached Neggo as Neggo was about to enter his car and asked him some questions regarding what he had done with his undeliverable mail. '

"A. That is true.

"Q. All right, sir. Did you discuss anything pertaining to this undeliverable mail after Mr. Johnson had entered the building, after he had left you and Mr. Neggo?

"A. Do you mean during his absence, during that period?

"THE COURT: Yes.

"MR. LAUFER: Yes.

"A. Before he came back?

"Q. Yes.

"A. I don't recall specifically talking about that particular letter or these particular --



this particular piece of mail that Mr. Johnson was looking for. We may have said something about it, but I don't remember." [Rep. Tr. p. 52, line 19 to p. 53, line 12].

"Q. Well, looking at your affidavit specifically commencing with item 17 on page 3, and I quote:

" 'The affiant returned after informing Inspector Jensen that he could not locate the three letters, the three test letters, ' -- I am sorry -- 'heard Inspector Jensen advise Rein Neggo, Jr. that he had the right to remain silent, the right to an attorney, and that anything he might say could be used against him;

" '18. That affiant asked Neggo if he had any coins with him and that Neggo voluntarily handed some coins to affiant and that among these coins was a marked .50 cent coin which had been enclosed in the test letter addressed to the Disabled American Veterans;

" '19. That affiant overheard Inspector Jensen ask Neggo where the rest of the stolen money and mail was and that Neggo stated that he had some at his home;

" '20. That affiant heard Inspector Jensen then tell Neggo that he was being placed under arrest



for theft of mail, ' does that refresh your memory, sir?

"A. Yes.

"Q. It was not until Mr. Neggo had transferred the 50-cent piece and after you had examined it that Inspector Jensen advised Mr. Neggo that he was under arrest, isn't that correct?

"A. This could be very possible.

"MR. LAUFER: Your Honor, may I approach the witness?

"THE COURT: You have already asked him, you have called his attention to the affidavit. You heard what he read from your affidavit?

"THE WITNESS: Yes, sir.

"Q. BY MR. LAUFER: Are the contents that I read to you from the affidavit true and correct, sir?

"A. To the best of my recollection they are, yes." [Rep. Tr. p. 69, line 11 to p. 70, line 24.]

"MR. LAUFER: I would like to briefly argue the matter, your Honor.

"THE COURT: Well, I have heard all of the testimony and I have thought about it a great deal. I don't think argument will be necessary.

"MR. LAUFER: There is one citation I have, your Honor, that I would like to submit.





"THE COURT: What is it?

"MR. LAUFER: That is Section 841 of the Penal Code of the State of California. It is my contention that the Government, that the postal inspectors --

"THE COURT: Is that the section that you cited in your motion?

"MR. LAUFER: No, it is not, sir.

"May I approach the bench?

"THE COURT: Yes.

"MR. LAUFER: 841 and 847, your Honor.

"THE COURT: What is your contention? Do you think a private person has to say, 'I am a private person'?

"MR. LAUFER: No, your Honor, I don't.

"THE COURT: What is your contention?

"MR. LAUFER: My contention is that when they first approached him attention was focused upon him, there is no question about that. At that point, the minute they contacted him, they were required under the law to inform him of his constitutional rights, and the evidence is that they did not do so until Mr. Johnson came out of the post office, and --

"THE COURT: I know all of this. I am asking you what your point is about 847 and 842.

"MR. LAUFER: 841.

"THE COURT: 841 and 847.



"MR. LAUFER: 841 is that no --

"THE COURT: All right, I have read it,  
But what --

"MR. LAUFER: At the time they approached him they did not tell him that he was under arrest and as a matter of fact he was.

"THE COURT: No, he was not under arrest. There is no showing that he was detained.

"MR. LAUFER: Well, he was not free to go.

"THE COURT: There is no showing to that effect.

"MR. LAUFER: There was a showing that they took the coins and everything else under color of authority --

"THE COURT: Well, they had advised him that he had a right to remain silent at that time, and he delivered the coins voluntarily, according to their testimony.

"MR. LAUFER: I think that the word 'voluntary', your Honor, was a conclusion on their part, because they told him to take it out. That appears in his affidavit.

"THE COURT: I am asking what it is about 841 that you think is significant, and 847.

"MR. LAUFER: Section 841 requires them in my opinion to tell him as soon as they approached him





that he was under arrest, because as a matter of fact he was. In Section 847 that is clearly spelled out.

"Under 847, when they arrest as private citizens, they must do one of two things, either take him to the nearest magistrate or turn him over to a police officer, and neither was done. They took him to his house. It is also obvious that the information which they got from him led them to the house.

"THE COURT: There is no showing that a United States commissioner or judge would have been available at that particular time." [Rep. Tr. p. 72, line 9 to p. 74, line 22.]

"STANLEY H. JENSEN, heretofore duly sworn, resumed the stand and testified further as follows:

"THE COURT: Mr. Jensen, approximately what time was it when you placed defendant under arrest?

"THE WITNESS: Probably about a quarter to 5:00.

"THE COURT: And that was in North Hollywood, was it?

"THE WITNESS: Yes. North Hollywood.

"THE COURT: And do you know how long it



takes to get from there to the Federal Building?

"THE WITNESS: At that time of the day I would say probably 45 minutes.

"THE COURT: And how long were you in the Neggo premises, that part of the premises known as the garage or room of the defendant?

"THE WITNESS: Oh, I would say less than 10 minutes in the room.

"THE COURT: All right. The court denies the motion to suppress.

"So we will proceed with the trial.

"Do you have any question?

"MR. LAUFER: Yes. One question.

"THE COURT: All right. I will vacate my ruling until after you have examined him.

"Q. BY MR. LAUFER: Mr. Jensen, did you tell the defendant that he had a right to be taken before a magistrate or any other official at the time you made the arrest?

"A. I don't think I told him that he had the right to be taken before a magistrate. I told him that he would be taken before the United States commissioner.

"Q. Did you have any discussion immediately at the time that you made the arrest as to where he would be taken at that time?



"A. At the immediate moment of the arrest, no. We proceeded with the rest of the conversation and we later discussed --

"Q. You searched his car after you told him he was under arrest, is that correct?

"A. Yes.

"Q. After you finished searching the car did you make any attempt to contact the U. S. marshal or the U. S. commissioner for an arrangement to place the defendant in custody?

"A. No, not at that moment.

"THE COURT: May I have the last question and answer.

(Question and answer read.)

"Q. BY MR. LAUFER: Did you make any arrangement within an hour of the arrest with any public official?

"A. No, I didn't call any public official within an hour.

"Q. Did you call any public official during the course of the evening?

"A. No, I did not.

"Q. As a matter of fact, you did not intend to take him down before any authority that night, did you?

"A. I --





"Q. Answer my question yes or no. Did you or did you not intend to take him down?

"A. Well, I had not made up my mind for a couple of hours whether I was going to take him down to the county jail and book him or allow him to go home and report in the morning, to come to the commissioner's office.

"Q. You kept him for two hours and you had not made up your mind as to whether or not you were going to book him?

"A. Within a couple of hours time, an hour, hour and a half.

"MR. LAUFER: Thank you. I have no further questions.

"THE COURT: Well, an hour or an hour and a half from when, from the time you told him he was under arrest?

"THE WITNESS: Yes.

"THE COURT: Well, how long did you stay at the parking lot near the post office after you told him he was under arrest?

"THE WITNESS: Only for the length of time required to make the search of the car, which was probably ten or fifteen minutes.

"THE COURT: And then you drove to his home?



"THE WITNESS: Yes.

"THE COURT: And how long were you there?

"THE WITNESS: Probably 15 minutes total.

"THE COURT: And then what did you do with him?

"THE WITNESS: Well, then he rode back to the post office with us. He had his car at the post office, and we asked him to come into the little office that we maintain there to talk with us for awhile and get some background information, and also asked him at that time if he would give us an affidavit, which he said he would not until he talked to his attorney, and that is probably where the other, roughly, hour to an hour and a half was consumed.

"THE COURT: Then you told him that he could go if he would report to the commissioner the following day?

"THE WITNESS: Yes.

"THE COURT: You told him he could go if he would voluntarily report to the United States commissioner the next day, is that right?

"THE WITNESS: Yes, sir.

"THE COURT: With respect to this marked coin which he handed you before you placed him under arrest, that was enclosed in what letter?

"THE WITNESS: That was enclosed in a



letter that was addressed to the Disabled American Veterans.

"THE COURT: What time did you get back to the post office after leaving his home?

"THE WITNESS: Probably 5:30.

"THE COURT: Did you know what hours the United States commissioner was in session in the Federal Building?

"THE WITNESS: Yes, sir.

"THE COURT: What hours?

"THE WITNESS: He is there until 4:30 in the evening." [Rep. Tr. p. 91, line 1 to p. 95, line 16.]

#### SPECIFICATION OF ERRORS RELIED UPON

1. The Trial Court erred in denying defendant's motion to suppress the evidence.

2. The Trial Court erred in admitting the evidence illegally obtained.

3. The Trial Court erred in finding the defendant guilty upon illegally obtained evidence.

4. The judgment of the Trial Court, adjudging the defendant guilty, is based upon illegally obtained evidence and is, therefore, against the law.





## ARGUMENT

### I

#### THE ARREST OF THE DEFENDANT WAS UNLAWFUL.

---

A. The case of United States v. Helbock, 76 F.Supp. 985 expressly holds that postal inspectors have no power to arrest. Ward v. United States, 316 F.2d 113 (1963), clearly approves the Helbock case. "There is apparently no federal law authorizing postal inspectors to make official arrests, i. e., because of their employment." Ward v. United States, supra, page 116, citing the Helbock case as authority for the foregoing proposition. The conviction in the Ward case was upheld on the ground that a valid citizen's arrest was made under Section 837 of the Penal Code of the State of California. It is, therefore, obvious that the validity, if any, of the defendant's arrest, has to be determined in accordance with state law in the state wherein the arrest was made, which in this case is the State of California.

The Government's argument in the District Court that Title 39, Section 3523 (2) (k) of the United States Code, impliedly authorizes postal inspectors to make an arrest was not accepted by the Court of Appeals in the Ward case.

B. The arrest of the defendant was unlawful under the state law. Although it has been held that a postal inspector may make an arrest as a private citizen, such arrest must comply with the laws of the state wherein it is made. In Ward v. United



States, cited herein, the arrest made by the postal inspectors was a citizen's arrest. In the Ward case the Court held that there was compliance with state law. It is respectfully submitted that in this case, the postal inspectors did not comply with state law. Section 847 of the Penal Code of the State of California reads, in part, as follows:

"§847. Arrest by private person; duty to take prisoner before magistrate or deliver him to peace officer.

"DUTY OF A PRIVATE PERSON WHO HAS MADE AN ARREST. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer."

The evidence in this case is uncontradicted that the arrest was made at approximately 4:20 P. M. On cross-examination, Inspector Jensen was asked the following:

"Q. . . . Did you or did you not intend to take him down?

"A. Well, I had not made up my mind for a couple of hours whether I was going to take him down to the county jail and book him or allow him to go home and report in the morning, to come to the commissioner's office." [Rptr. Tr. p. 93, lines 12-17]



The foregoing answer clearly indicates that the arresting officers kept the defendant in custody for a period of two hours, when in fact they could have taken him down and booked him in the County Jail. The record is, therefore, clear that the defendant could have been turned over to a peace officer or booked at the County Jail within a matter of an hour from the time of his arrest. The reason that the defendant was kept in custody is quite obvious. The arresting inspectors wanted a confession from him, in affidavit form, and wanted to search his dwelling, which in fact they did. That the unnecessary delay invalidated the arrest is beyond any question. Consequently, all evidence obtained thereafter became inadmissible.

In People v. Martin (1964), 225 Cal. App. 2d 91, 36 Cal. Rptr. 924, the District Court of Appeal interprets Section 837 in some detail and the consequences of not complying with said section. Mr. Justice Burke, who wrote the opinion in the Martin case, cited above, states, among other things, the following:

"An officer's power of arrest, when acting beyond the limits of the geographical unit by which he is appointed, becomes that which is conferred upon a private citizen in the same circumstances."

Again, the Court continues:

"A private citizen, unlike a peace officer, may not arrest whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence or whenever he has reasonable





cause to believe that such person has committed a felony, whether or not a felony has in fact been committed (Pen. Code §§ 836, 837). The arrest being illegal, the subsequent search was also illegal and the evidence seized in the search should have been suppressed. While the search of a person being arrested by a citizen is authorized by section 846 of the Penal Code in the removal of all offensive weapons from the person of the one arrested, no express authority exists for a citizen to conduct a search of an arrested person's dwelling as an incident to an arrest. The duty of the citizen upon making a lawful arrest is to take the arrested person to the nearest or most accessible magistrate in the county in which the arrest is made and to make a complaint stating the charge against the person arrested (Pen. Code, §849) or, as an alternative, to deliver the arrested person to a police officer (Pen. Code, §847)."

In view of the interpretation of Sections 837 and 847 of the Penal Code of the State of California, and the obvious violation thereof by the postal inspectors in this case, it is quite obviously unnecessary to discuss as to whether or not the arresting inspectors in the instant case did or did not have probable cause to make the arrest. Their failure to comply with Section 847 makes the



arrest unlawful.

## II

### THE EVIDENCE SPECIFIED IN THE INDICT- MENT WAS OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE

---

It is respectfully submitted that the act of searching defendant's dwelling and seizing the evidence alleged in the indictment was unlawful. In the first place, the search was not incidental to the arrest and was made some distance from the place of arrest. Consequently, it cannot be reasonably argued that this was a search incident to an arrest.

Secondly, the search conducted by Inspectors Jensen and Johnson was an express violation of Title 39, Section 903, United States Code, which reads as follows:

"§903. Searches authorized

"The Postmaster General, by letter of authority filed in the Department, may authorize any postal inspector or other officer of the Department to make searches for mailable matter transported in violation of law. When the authorized officer has reason to believe that mailable matter transported contrary to law may be found therein, he may open and search any --

"(1) vehicle passing, or having lately passed, from a place at which there is a post office of the



United States;

"(2) article being, or having lately been, in the vehicle;

"(3) store or office, other than a dwelling house, used or occupied by a common carrier or transportation company, in which an article may be contained."

Said Section states that the Postmaster General, by letter of authority filed in the Department, may authorize any Postal Inspector or other officer to search various premises. Sub-Section 3 of Section 903 expressly excludes a dwelling house from the authorized searches. Consequently, the act of the officers searching the dwelling house of the defendant was unlawful and unauthorized. In view of the fact that Sub-Section 3 expressly excludes a dwelling house, it is clear that even if the Inspectors had a warrant to search the dwelling house of the defendant, they could not do so in light of the express exclusion made in Subsection 3. There is, therefore, no question but that this Section is applicable to the instant case and that Inspectors Jensen and Johnson had no authority to enter or search the dwelling house of the defendant.

An examination of the affidavits of Inspector Jensen and Inspector Johnson clearly indicates that they entered the defendant's home after they had made the arrest. The defendant, of course, denied that he had given the inspectors any consent. However, even if such consent were given, it would, as a matter





of law, be involuntary. Consent given in submission to an express or implied assertion of authority cannot be said to be free nor voluntary. People v. Michael, 45 Cal. 2d 751, 290 P. 2d 852.

"Accordingly, both the purported consent of the defendant for search and the fruits of that search must be deemed to have been inadmissible as evidence against defendant."

People v. Michael, cited hereinabove. People v. Burke, 47 Cal. 2d 45, 301 P. 2d 24, 44 Cal. Jur. 2d 342.

Permission granted after a person has been improperly arrested and searched, while he is still in custody and has not been informed of his legal right to refuse permission, is not a real and proper consent to search. U. S. v. Lerner, 100 F. Supp. 765.

The rationale behind the rule set forth above regarding the issues of consent and voluntariness is obvious. A person who has been arrested and who is in custody can hardly refuse to do anything which he is told to do by the arresting person because by refusing to do so, the person arrested might very well be charged with resisting an arrest.

It is to be noted that the postal inspectors do not deny the statement of the defendant, set forth in his affidavit, that he was taken by them in their car to his home. The inspectors, in fact, admit having removed the letters from his home.



### III

#### THE DEFENDANT WAS DENIED THE RIGHT TO COUNSEL

---

If the argument of the Government is to be accepted, that the postal inspectors had probable cause to make the arrest, it must be done so on the basis of their statements that they had been following the defendant during the day and suspected him of having stolen the mail. If this is so, then their investigation had in fact focused upon the defendant within the meaning of Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 977, 12 L. Ed. 2d 1758, and when they first approached him, they had to, as a matter of law, inform him of his constitutional rights to counsel and to remain silent. The affidavit of Stan H. Jensen, commencing with Paragraphs 5 through 8, inclusive, indicates that the defendant was not immediately advised of his constitutional rights. In fact, said affidavit corroborates the defendant's contentions. Inspector Jensen states that after having approached the defendant, he asked him some questions regarding what the defendant had done with his undeliverable mail; that said inspector showed the defendant his identification card, that said inspector Johnson was then despatched by Mr. Jensen to the building to check on the undeliverable mail, that after being informed by Mr. Johnson that the undeliverable mail could not be located, Mr. Jensen advised the defendant of his constitutional rights. It is obvious, therefore, that Inspector Jensen and the defendant had a



discussion prior to giving him any advice as to his constitutional rights. It was only after Mr. Jensen had been told that the letters were not in the post office building that he advised the defendant of his constitutional rights to counsel. Consequently, the defendant was denied his right to counsel as required by law. If it be assumed that the argument of the Government is correct, i. e. that the postal inspectors had probable cause to arrest the defendant because of the surveillance conducted on January 27, 1966, then obviously the investigation had focused upon the defendant even prior to the time that the postal inspectors approached the defendant in the parking lot. If that is the case, then the principles propounded in the Escobedo case are here clearly applicable. The Escobedo case provides that where the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus upon a particular suspect and the suspect has been taken into custody, and the officers carry out a process of interrogation that lends itself to eliciting incriminating statements, and the officers have not effectively warned the suspect of his absolute constitutional right to remain silent, the accused has been denied assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States.

The evidence is conclusive that Mr. Jensen, Senior Inspector in this case, exhibited his badge to the defendant as he approached the defendant's car. By so doing, he clearly restrained the defendant's movements and as a matter of substance, the arrest took place at that time. It is common knowledge that





an employee, approached by a superior, is going to submit to the authority of the superior for fear of losing his job in not submitting. That this happened in this case, is rather obvious. That the postal inspectors intended to make the arrest as they approached the defendant is beyond question. Their only purpose in failing to immediately inform the defendant that he was under arrest was clearly intended to elicit incriminating evidence from him, which is exactly what happened.

### CONCLUSION

It is respectfully submitted that the affidavits filed by the Government in opposition to defendant's motion and their testimony on cross-examination conclusively support defendant's contentions made herein. That because of the unlawful arrest made by the Government and because of the unlawful search and seizure, the District Court should have granted defendant's motion to suppress the evidence specified in the indictment. That in view of the fact that the judgment of the Court rests upon illegally obtained evidence, it is prayed that said judgment be reversed and that the District Court be directed to dismiss the proceedings against the defendant.

Respectfully submitted,

CHARLES A. LAUFER

Attorney for Appellant



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Charles A. Laufer  
CHARLES A. LAUFER



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ANTHONY MICHAEL GLASSMAN,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.

WM. B. LUCK, CLERK

FILED

1 1967





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ANTHONY MICHAEL GLASSMAN,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATUTE INVOLVED	2
III QUESTIONS PRESENTED	3
IV STATEMENT OF FACTS	3
ARGUMENT	7
A. THE ARREST OF APPELLANT WAS LAWFUL.	7
(1) There Was Sufficient Probable Cause To Arrest Appellant.	7
(2) United States Postal Inspectors Have the Power to Make Arrests Under Federal Laws.	9
(3) There Was No Unreasonable Delay In Taking Appellant Before a United States Commissioner.	10
B. APPELLANT VOLUNTARILY TURNED OVER SUFFICIENT EVIDENCE UPON WHICH TO BASE HIS CONVICTION.	12
C. APPELLANT CONSENTED TO THE SEARCH OF HIS LIVING QUARTERS.	14
D. APPELLANT WAS NOT DENIED HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.	17
CONCLUSION	19
CERTIFICATE	20



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Amos v. United States, 225 U.S. 313 (1920)	15
Beck v. Ohio, 379 U.S. 89 (1964)	8
Burke v. United States, 328 F.2d 399 (1st Cir. 1964)	13
Cipres v. United States, 343 F.2d 95 (9th Cir. 1965)	12
Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953)	16
Escobedo v. Illinois, 378 U.S. 478 (1963)	18
Hoffa v. United States, 35 Law Week 4058 (Dec. 12, 1966)	17
Johnson v. New Jersey, 384 U.S. 719 (1966)	18
Mallory v. United States, 354 U.S. 449 (1957)	11, 12
Miranda v. Arizona, 384 U.S. 436 (1966)	18
People v. Martin, 225 Cal.App.2d 91 (1964)	11
United States v. Dornblut, 261 F.2d 949 (2nd Cir. 1958)	16
United States v. Haas, 109 F.Supp. 443 (D.C. Pa. 1952)	14
United States v. Mitchell, 322 U.S. 65 (1944)	12, 16
United States v. Page, 302 F.2d 81 (9th Cir. 1963)	15
United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959)	15





	<u>Page</u>
Ward v. United States, 316 F.2d 113 (9th Cir. 1963)	9

### Constitution

#### United States Constitution:

Fourth Amendment	15, 16
Sixth Amendment	3, 17

### Statutes

California Penal Code, §837	10
California Penal Code, §847	10, 11
Title 18, United States Code, §1709	1, 2
Title 18, United States Code, §3231	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2
Title 39, United States Code, §903	14
Title 39, United States Code, §3523(a)(2)(k)	9, 10

### Rules

#### Federal Rules of Criminal Procedure:

Rule 5(a)	11
Rule 18	2
Rule 37(a)	2



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Rein Neggo, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on February 9, 1966. The one-count indictment was brought under Title 18, United States Code, Section 1709, and charged that on or about January 27, 1966, in Los Angeles County, the appellant embezzled six letters, which letters had been entrusted to him and which had come into his possession intended to be conveyed by mail.

On March 14, 1966, the appellant pleaded not guilty. The



case proceeded to trial before the Honorable Francis C. Whelan on April 7, 1966. The court found appellant guilty on April 11, 1966.

Appellant's Notice of Appeal was timely filed [C. T. 45]. 1/

The jurisdiction of the District Court was based upon Title 18, U. S. C., Sections 1709, 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, U. S. C., Sections 1291 and 1294, and Rule 37(a) of the Federal Rules of Criminal Procedure.

## II

### STATUTE INVOLVED

The indictment was brought under Title 18, U. S. C., Section 1709, which provides in pertinent part as follows:

"Whoever, being a . . . Postal Service employee, embezzles any letter, postal card . . . or mail or any article or thing contained therein intrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from

---

1/ C. T. refers to Clerk's Transcript of Record.





any post office or station thereof established by authority of the Postmaster General; or steals, abstracts, or removes from any such letter, . . . or mail, any article or thing contained therein, shall be fined not more than \$2,000 or imprisoned not more than five years, or both."

### III

#### QUESTIONS PRESENTED

- A. Was There Sufficient Probable Cause to Arrest Appellant?
- B. Did Appellant Voluntarily Turn Over Evidence to the Postal Inspectors?
- C. If the Postal Inspectors Did Conduct a Search, Was it Valid?
- D. Was Appellant Denied His Right to Counsel Under the Sixth Amendment?

### IV

#### STATEMENT OF FACTS

Prior to January 27, 1966, charting and analysis of missing mail by United States Postal Inspectors indicated that appellant might be embezzling mail which he should have delivered along his various delivery routes [R. T. 36, 39]. 2/

---

2/ R. T. refers to Reporter's Transcript of Record.



On the morning of January 27, 1966, a test delivery letter addressed to a fictitious address on Vantage Street was placed in appellant's carrier case [R. T. 137]. At approximately 9:00 A. M., appellant was observed by Inspector Johnson making deliveries on his route. At 9:10 A. M., Inspector Johnson went to the intersection of Bellingham and DeHougne and deposited two test collection letters in the mail box. At 9:20 A. M., appellant was observed making deliveries on Vantage Street where the test delivery letter had been addressed to the fictitious address [R. T. 112]. At approximately 10:30 A. M., Inspector Johnson opened the mail box at Bellingham and DeHougne and found that the test collection letters had been picked up [R. T. 113].

Thereafter, Inspector Johnson called George Clark at the North Hollywood Post Office and told him that the two test collection letters had been picked up by the appellant and that Clark should attempt to locate these letters when appellant returned with his collection mail [R. T. 114].

At approximately 1:30 P. M., Inspector Johnson met with Postal Inspector Jensen at the North Hollywood Post Office. At this time Johnson told Jensen of his surveillance activities and of the test letters [R. T. 114]. Thereafter the Post Office was searched for the test letters with a negative result [R. T. 115].

At approximately 4:20 P. M., Inspectors Jensen and Johnson approached appellant in the parking lot outside the North Hollywood Post Office. Inspector Jensen identified himself as a Postal Inspector and asked appellant if he could talk with him



concerning some mail that was under investigation [R. T. 143]. Appellant was asked about the test delivery letter that had been addressed to the fictitious address on Vantage Street. Appellant responded that the letter was with his mark-ups inside the building. At that point Inspector Johnson returned to the building and attempted to locate the letter. Approximately five minutes later Johnson returned and indicated that the letter could not be found.

Inspector Jensen then told appellant that "in view of the fact that the letter could not be found it appeared that we had what might become a criminal matter, and for that reason I informed him that he had a right to remain silent; anything he said could be used against him in court, and that he had a right to counsel by an attorney or any other person of his choosing" [R. T. 145].

Inspector Jensen then "told him that it appeared very strongly that he had possibly stolen a letter, or two or three, and I asked him concerning how much money he had with him, how much he had taken out of his personal money that morning, asked him if he had any money on him then, if I could see what he had.

"He then reached in his pocket and produced his wallet, and I looked through the wallet. While I was doing so both Mr. Johnson and I, I think almost simultaneously, asked if he had coin, and at that point he reached in his pocket and said, 'Yes,' and he handed Mr. Johnson some coins." [R. T. 145].

Mr. Johnson examined the coins and found a marked fifty-cent piece that had been inserted in one of the test letters which





had been prepared for collection by appellant that day [R. T. 146]. At this point appellant was told that he was under arrest [R. T. 147]. Inspector Jensen then asked appellant if he wouldn't like to tell the inspector about the rifled mail [R. T. 146]. Appellant then admitted that he had rifled the mail and further stated that the money was at his home [R. T. 148].

Mr. Jensen then asked appellant if he would object to taking the inspectors out to his house to obtain the money and other envelopes that he had embezzled [R. T. 147]. Appellant responded that he would go with the inspectors and they proceeded to drive to appellant's home [R. T. 147].

Upon arrival at appellant's home, Inspector Jensen and appellant walked to appellant's living quarters, a garage adjacent to the main house. Appellant opened the door of the garage and entered. Jensen entered after appellant and noticed some envelopes which he recognized on a dresser. Appellant reached over and handed two or three of the envelopes to Jensen. Appellant then initialled the envelopes and put the date on them for identification [R. T. 148]. At this point appellant asked the inspectors if they would discontinue the search and they complied [R. T. 149].

Inspector Jensen then asked appellant if he would retrieve the money which he had extracted from the letters. Appellant stated that he had the money in the main house and that he would get it. While the inspectors remained outside, appellant went inside the house by himself and returned with ten \$1.00 bills [R. T. 149].



Inspector Jensen compared the serial numbers of the bills handed to him and three of the serial numbers corresponded to a previously recorded list of bills that had been placed inside test letters [R. T. 152].

Thereafter, appellant was taken back to the North Hollywood Post Office where they arrived at approximately 5:30 P. M. [R. T. 158]. After supplying the inspectors with some personal information, appellant was permitted to leave by himself upon his assurance that he would report to the United States Commissioner the next day voluntarily.

### ARGUMENT

A.

#### THE ARREST OF APPELLANT WAS LAWFUL.

- (1) There Was Sufficient Probable Cause to Arrest Appellant.
- 

At the time that Inspectors Jensen and Johnson approached appellant outside of the post office in North Hollywood, they had been made aware of the following facts:

1. That charting and analysis of missing mail indicated that appellant might be embezzling mail which he should have delivered along his delivery route;
2. That three test letters had been prepared by Inspector Johnson on January 27, 1966, for handling by appellant in the



normal course of his duties that day;

3. That earlier that afternoon appellant had been seen delivering mail on Vantage Street where one of the test letters had been directed to a fictitious address;

4. That appellant had picked up the collection letters which had been deposited in the mail box at Bellingham and De Hougne;

5. That a check of the North Hollywood post office later that day failed to turn up the undeliverable test letter or the two test collection letters handled by appellant.

6. That appellant had in his possession a marked fifty cent coin that had been inserted inside a test letter earlier that day.

The above facts were clearly sufficient to warrant a reasonable, prudent man in believing that appellant had embezzled the test letters. As was stated by the Supreme Court in Beck v. Ohio, 379 U. S. 89, 91 (1964):

"Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause . . . whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."





(2) United States Postal Inspectors Have  
the Power to Make Arrests Under  
Federal Laws.

---

Title 39, United States Code, Section 3523(a)(2)(k) clearly indicates that Congress has granted to United States Postal Inspectors the power to effectuate the arrest of postal violators. Section 3523(a)(2)(k), provides as follows:

"(2) Duties and responsibilities --

"(k) In any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court."

The Government has previously urged this point before this Court in Ward v. United States, 316 F.2d 113, 118 (9 Cir. 1963).

At that time Judge Barnes stated for the Court:

"We have not here passed upon the right of the postal inspectors, other than as private citizens, to make an arrest. The government urges they do. See 39 U.S.C. §3523(a)(2)(k), where it is implied that they have such authority. We do not meet that question, as it is here unnecessary."



The Government again urges this Court to consider the power of postal inspectors under §3523(a)(2)(k). and to hold that there is a federal grant of power authorizing United States Postal Inspectors to make arrests for violations of United States postal laws.

In the alternative, should this Court again decide not to pass upon the question of the scope of authority under §3523(a)(2)(k). Inspectors Johnson and Jensen clearly had the power under California law to make a citizen's arrest. Section 837 of the California Penal Code provides in part:

"A private person may arrest another:

" . . . .

"3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

(3) There Was No Unreasonable Delay in Taking Appellant Before a United States Commissioner.

---

Appellant contends that there was a violation of Section 847 of the California Penal Code in that appellant was not immediately taken before a magistrate after his arrest. Assuming, arguendo, that California law applies, it is respectfully urged that appellant's rights were in no way violated. As appellant notes in his brief the arrest was made at approximately 4:20 P. M. The United States Commissioner's office in Los Angeles closes between



approximately 4:30 and 4:45 P. M. [R. T. 96]. If the Inspectors had attempted to take appellant to the United States Commissioner's office immediately after his arrest at 4:30, they would not have arrived until after 5:00 [R. T. 91]. Rather than take appellant from North Hollywood to downtown Los Angeles and hold him in custody overnight before he could be arraigned the next day, the Inspectors allowed appellant to go home overnight and voluntarily report back to the U. S. Marshal's office the next day.

People v. Martin, 225 Cal. App. 2d 91 (1964), cited by appellant is inapplicable to the case at bar. In the Martin case the District Court of Appeal reversed the conviction because of an illegal arrest. The reversal had nothing to do with a failure, if in fact there was one, to comply with the Section 847 requirement of taking a defendant directly to a magistrate. There was no discussion of how long the defendant was in custody prior to his being taken before a magistrate.

Finally, there appears to be no authority which holds that if a defendant is not arraigned promptly the preceding arrest is thereby invalidated. By analogy, the Mallory Rule in the Federal Courts <sup>3/</sup> which holds that statements made by a defendant after he has been held for an unreasonable period of time before being arraigned are inadmissible but that statements made before the detention has become unreasonable are admissible would seem to be applicable.

---

3/ Rule 5(a) Federal Rules of Criminal Procedure.





Mallory v. United States, 354 U. S. 449 (1957);

United States v. Mitchell, 322 U. S. 65 (1944).

The actions of the postal inspectors in this case in dealing with appellant, are certainly reasonable. Rather than attempt to take appellant before the U. S. Commissioner at an hour when the Commissioner would most likely not have been present and thereafter force him to spend the night in jail, they allowed him to go home and report the next day. Certainly this consideration and considerate treatment of a defendant is to be commended rather than censured.

B.

APPELLANT VOLUNTARILY TURNED OVER  
SUFFICIENT EVIDENCE UPON WHICH TO  
BASE HIS CONVICTION.

---

The Government contends that the chronology of events following appellant's initial confrontation with the postal inspectors as set forth in the statement of facts clearly demonstrates that appellant voluntarily turned over the marked fifty-cent piece which had been inserted in one of the test letters. <sup>4/</sup> After being thoroughly advised of his constitutional rights and of the nature of the

---

<sup>4/</sup> In the alternative the government would submit that if the turnover of the marked coin is not held to be voluntary then clearly it was the result of a search incident to a valid arrest or substantially contemporaneous with a valid arrest.

Cipres v. United States, 343 F.2d 95  
(9 Cir. 1965).



investigation, appellant was asked if he had any money on him and if he would show it to the inspectors [R. T. 145]. Appellant then reached in his pocket and handed Inspector Johnson the marked coin [R. T. 145]. It is to be noted that no force was exerted other than the request that appellant show the inspectors his coins.

A case factually similar to the case at bar is Burke v. United States, 328 F.2d 399, 403 (1 Cir. 1964). In Burke, one of the defendants was arrested at 2:30 A.M. Thereafter, at 9:30 the next morning the defendant was fully advised of his constitutional rights, including specific advice that the postal inspectors were investigating a mail robbery. The inspectors then asked the defendant if they could look at what he had in his pockets. The defendant then brought out a wallet and emptied it. The wallet contained two marked \$20 bills. The 1st Circuit held that the arrest was illegal but that the two \$20 bills should not have been suppressed because the turning over of the bills was "made deliberately and voluntarily on the basis of an intervening independent act of his own free will, and that they were not made under the compulsion of the illegal arrest." It is to be noted that in Burke the defendant had been in the psychologically coercive atmosphere of a jail for seven hours and yet his act was still deemed to be voluntary. How much less coercive are the circumstances in the case at bar where the defendant was in the presence of two postal inspectors for only a few minutes before he turned over the marked coin?



APPELLANT CONSENTED TO THE SEARCH  
OF HIS LIVING QUARTERS.

---

Appellant argues that Title 39, United States Code, Section 903, effectively precludes a postal inspector from searching a dwelling house. However, Section 903 does not preclude a search of a dwelling house of a defendant who consents to such a search. A case in point is United States v. Haas, 109 F. Supp. 443 (D. C. Pa. 1952). In Haas, the District Court stated at page 444:

"I can find no restriction in the quoted statute which declares illegal the voluntary act of a defendant in consenting to a postal inspector visiting his home and in voluntarily and actively giving to him certain mailable matter."

The court went on to say with facts almost identical to those at bar:

"But defendant . . . voluntarily and willingly consented to the Postal Inspector entering his dwelling and, as the evidence further established defendant himself, on his own volition, made the mailable matter available to the Postal Inspector."

The question thus becomes, did the defendant Negro consent to the search of his living quarters?





The fact that defendant Neggo had been placed under arrest prior to the seizure of the letters in his garage, does not preclude the possibility of his having consented to the search. As the Ninth Circuit has held in United States v. Page, 302 F.2d 81 (9 Cir. 1963), at page 83:

"We have no reservations as to the importance of maintaining the protection afforded to the citizen by the Fourth Amendment. . . .

"Nevertheless, it has been long established that one can validly consent to a search, even though the consent be given while the defendant is in custody (citations omitted) . . . .

"Whether such consent has been given is, in the first instance, a question of fact for the trial court.

"Many decisions of the other Courts of Appeals sustain the trial court's finding that there was consent to a search, even though the consent was obtained under authority of the badge, or while defendant was under arrest. . . ."

Consent to a search or seizure constitutes a waiver of rights secured by the Fourth Amendment.

Amos v. United States, 225 U.S. 313 (1920);

United States v. Sclafani, 265 F.2d 408

(2 Cir. 1959);



(2 Cir. 1958).

That an individual can consent to a search of his home and acknowledge his guilt voluntarily cannot be denied. As was stated by Justice Frankfurter in United States v. Mitchell, supra at page 70 (1944):

"Here there was no disclosure induced by illegal detention, no evidence was obtained in the violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent viewing apparently of such spontaneous cooperation and concession of guilt."

In the case at bar defendant Neggo admitted to the Inspectors that the stolen mail and money were at his residence. He was asked if he would accompany the Inspectors to his residence to get the stolen property and he agreed to go with them. Upon arriving at Neggo's garage, Neggo himself opened the garage door for Inspector Jensen. Upon entering the converted garage, Inspector Jensen could see in plain view several letters lying on a dresser. The mere observation of what is freely exposed to view does not constitute a "search" within the meaning of the Fourth Amendment to the Constitution. Ellison v. United States, 206 F.2d 476 (D. C. Cir. 1953).

Finally it seems quite clear that the appellant recognized



that the inspectors were engaged in a "consent search" of his living quarters. When the inspectors started searching through appellant's dresser he apparently decided that the search had gone far enough and he requested them to stop. The inspectors complied with appellant's request further indicating that they too intended to search only so long as appellant permitted the search.

D.

APPELLANT WAS NOT DENIED HIS RIGHT  
TO COUNSEL UNDER THE SIXTH AMENDMENT.

---

Appellant appears to be arguing that he was deprived of his right to counsel because the inspectors did not advise him of his constitutional rights when they first approached him. In spite of the fact that the inspectors had sufficient probable cause to arrest appellant when they first approached him they were under no obligation to arrest him at that very moment. There is no constitutional right to be arrested.

Hoffa v. United States, 35 L. W. 4058, 4063

(Dec. 12, 1966).

The inspectors sought to give appellant one last chance to justify his actions. They asked him about the test delivery letter that had been addressed to the fictitious address on Vantage Street. Appellant responded that the letter was inside the post office. Immediately after determining that the letter was not inside the post office appellant was thoroughly advised of his constitutional





rights. Prior to this time appellant had made no incriminating statements. All admissions were made after the constitutional admonition was given.

Finally, the inspectors fully complied with the requirements of Escobedo v. Illinois, 378 U. S. 478 (1963). When appellant was first approached in the parking lot and commenced his conversation with the inspectors the ensuing conversation did not amount to a "custodial interrogation," within the meaning of Miranda v. Arizona, 384 U. S. 436, 444 (1966). The Supreme Court defined custodial interrogation in Miranda as follows:

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

"This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." 5/

---

5/ It is to be noted that the Miranda case is not applicable to the case at bar and is only cited to assist in clarifying Escobedo v. Illinois, supra. Johnson v. New Jersey, 384 U. S. 719 (1966).



## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

ANTHONY MICHAEL GLASSMAN,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman  
ANTHONY MICHAEL GLASSMAN





N O. 2 1 1 3 1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR. ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

REPLY BRIEF OF APPELLANT

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

FILED

MAY 16 1967

JWM B. LUCK, CLERK

CHARLES A. LAUFER

14120 Victory Boulevard  
Van Nuys, California

Attorney for Appellant.

MAY 18 1967



N O. 2 1 1 3 1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR. ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

REPLY BRIEF OF APPELLANT

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

CHARLES A. LAUFER

14120 Victory Boulevard  
Van Nuys, California

Attorney for Appellant.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
ARGUMENT	3
I THE ARREST OF APPELLANT WAS UNLAWFUL.	3
A. There Was No Probable Cause to Arrest Appellant.	3
B. United States Postal Inspectors Have No Right to Make An Arrest Under Federal Law.	4
II APPELLANT'S ARREST OCCURRED BEFORE ANY SEARCH OR SEIZURE WAS CONDUCTED.	5
III APPELLANT WAS DENIED THE RIGHT TO COUNSEL UNDER <u>ESCOBEDO v. ILLINOIS</u> .	6
IV THE EVIDENCE OBTAINED RESULTED FROM AN UNLAWFUL SEARCH AND SEIZURE.	7
V APPELLANT WAS NOT ARRAIGNED IN A TIMELY MANNER.	8
CONCLUSION	9
CERTIFICATE	10





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Escobedo v. Illinois, 378 U.S. 478	6, 7
Miranda v. Arizona, 384 U.S. 436	6, 8
United States v. Haas, 109 F.Supp. 443	7
United States v. Helbock, 76 F.Supp. 985	4
Ward v. United States, 316 F.2d 113 (9th Cir. 1963)	4
<u>Statutes</u>	
California Penal Code, §835	5
Title 39, United States Code, §903	7
<u>Texts</u>	
Black's Law Dictionary	5
Webster's Unabridged Dictionary	8



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REIN NEGGO, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

REPLY BRIEF OF APPELLANT

---

A brief summary of the relevant facts presented by the Government, which occurred prior to the arrest, are these:

1. That on January 27, 1966, which was the date on which defendant was arrested, the charting analysis of the Post Office Department indicated that mail along the delivery route serviced by the Appellant was missing or was being stolen;
2. That test delivery letters were planted by Postal Inspectors on the morning of January 27, 1966;
3. That surveillance of the Appellant was commenced on the morning of January 27, 1966 by Postal Inspector Johnson;
4. That after Appellant had returned to the Post Office, having completed his daily delivery, a search was made of the test



letters, which were not found by anyone in the Post Office, nor by the Postal Inspectors;

5. That at approximately 4:20 P. M. , as the defendant was leaving the postal station and was still on the premises in the parking lot, the Appellant was approached by the Postal Inspectors who identified themselves as such;

6. That the Postal Inspectors then questioned Appellant concerning the missing mail.

It is to be noted that the contents of the affidavits of the Postal Inspectors, filed in opposition to the motion to suppress, fail to contain any statement that anyone had seen the missing mail in the Appellant's possession. There was no evidence of any kind that anyone saw the Appellant take the letters, either on his route or at the post office. Nor was there any evidence from anyone that the letters were not brought back by the Appellant after completing his delivery route to the postal station. Parenthetically, it is respectfully pointed out that Appellant was a relief mail carrier and that his delivery route varied from time to time. The only concrete facts that the Postal Inspectors had available up to the time that they approached the Appellant's car, which was at 4:20 P. M. , was the fact that letters were missing and that these letters had not been found by anyone.





## ARGUMENT

### I

#### THE ARREST OF APPELLANT WAS UNLAWFUL.

---

##### A. There Was No Probable Cause to Arrest Appellant.

---

While it is reasonable to conclude that the Postal Inspectors may have been justified in casting suspicion upon the Appellant as a possible suspect, there was no evidence to suggest that he was the probable embezzler of the mail. The Postal Inspectors had no information, other than the mere suspicion, that the Appellant had taken and retained the mail. Had the Postal Inspectors known that the Appellant had taken the mail and retained it, there would have been no necessity, nor any reason, to search the postal station after Appellant returned from his daily delivery route. The evidence was clear that extensive searches for the mail were made by postal officials after Appellant returned from his route.

The words "probable cause" do not mean a mere suspicion nor do they mean a mere possibility. "Probable cause" clearly implies, and means, that some concrete evidence is available, justifying the conclusion that an act had been perpetrated. In this case, it obviously means evidence indicating that Appellant had taken the mail or that he was in possession of the mail. There was no direct evidence to that effect prior to the time that the Postal Inspectors approached the Appellant in the parking lot of the postal



station after his daily work had been completed. It is, therefore, respectfully submitted that no "probable cause" existed to warrant an arrest based upon the limited surveillance on January 27, 1966.

B. United States Postal Inspectors Have  
No Right to Make An Arrest Under  
Federal Law.

---

The ruling of the Court in United States v. Helbock, 76 F. Supp. 985, to the effect that Postal Inspectors have no right to arrest, has thus far not been overruled. In fact, in Ward v. United States, this Court was faced with a similar situation and it at that time elected to hold that the arrest was valid under state law, thus sidestepping the question of whether or not Postal Inspectors had the right to arrest under federal law.

The right of a Postal Inspector to make an arrest has been the subject of considerable discussion both in the Legislative and the Judicial branches of the Government. The Postal Service has repeatedly demanded that it be given the right to make arrests, yet the Congress has repeatedly denied Postal Inspectors that right. Consequently, the ruling in the Helbock case, as well as the Ward case, is clearly consistent with the legislative policy which has thus far denied Postal Inspectors the right to make an arrest under federal law. The appellant concedes that Postal Inspectors have "the power" to make an arrest. Their right, however, to make an arrest under federal law is denied by Appellant.



## II

### APPELLANT'S ARREST OCCURRED BEFORE ANY SEARCH OR SEIZURE WAS CONDUCTED.

---

The Government contends that Appellant was not arrested until after he had emptied his pockets and the incriminating fifty cent coin was identified by Postal Inspector Johnson. This contention is wholly without merit. The word "arrest", as defined in Black's Law Dictionary, means "to deprive a person of his liberty by legal authority". Section 835 of the Penal Code of the State of California reads, in part, as follows:

"An arrest is made by an actual restraint of the person of defendant, or by his submission to the custody of an officer."

In the case at bar, the two Postal Inspectors approached the Appellant's car, as he was about to enter same, in the parking lot of the postal station. At the time they approached the car, they exhibited the postal identification card, identifying them as Postal Inspectors. At that time Appellant was a postal employee and was required to submit to their authority. Appellant was not free to leave and, of course, submitted to their authority. It is obvious, therefore, that from the moment the Postal Inspectors identified themselves and commenced questioning Appellant, he was deprived of his right to leave and as a practical matter, the arrest had taken place at that point. To conclude otherwise would





amount to giving law enforcement officers authority to restrain an individual for an indefinite period of time, which the legislatures and the Courts have thus far denied them. The conduct of the Postal Inspectors, after they had approached Appellant's car in the parking lot of the postal station, is clearly indicative, as a matter of law, that a confinement of the Appellant had taken place the moment they approached his automobile.

### III

#### APPELLANT WAS DENIED THE RIGHT TO COUNSEL UNDER ESCOBEDO v. ILLINOIS.

---

If in fact Appellant was arrested and in custody after the Postal Inspectors had detained him in the parking lot of the postal station, or if the Postal Inspectors had probable cause to arrest the Appellant as the Government contends, then Appellant was clearly denied his right to counsel under the Escobedo ruling. There is no question about the fact that the interrogation which commenced as soon as the Postal Inspectors approached Appellant's car, amounted to "custodial interrogation" within the meaning of the Escobedo decision, as well as under the Miranda case. The arresting officers have unequivocally stated that they did not advise Appellant of his rights to counsel and the remaining constitutional rights until after they had recovered the marked coin. The marked coin was recovered after a substantial period of time had elapsed and after numerous statements were made in the parking lot of the



postal station.

#### IV

#### THE EVIDENCE OBTAINED RESULTED FROM AN UNLAWFUL SEARCH AND SEIZURE.

---

Appellant respectfully submits that the evidence obtained should have been suppressed at the time of trial. Since the arrest of Appellant was illegal under state law for lack of probable cause, all evidence obtained subsequent to said arrest is inadmissible. The evidence obtained shortly after taking Appellant into custody was the marked coin.

The evidence obtained at Appellant's home clearly violates Title 39, Section 903, United States Code, for it expressly prohibits Postal Inspectors from searching the dwelling of Appellant. The Government's argument that Appellant turned over the evidence voluntarily, is without foundation. The Government's contention that the case of United States v. Haas, cited by the Government to support its contention, is inaccurate for the reason that the facts in the Haas case were entirely different from the facts in the case at bar. In the Haas case, the defendant was not in custody when he turned over the evidence that convicted him. Furthermore, the remaining circumstances in said case are clearly distinguishable from the situation involved in this case. It is extremely doubtful as to whether the Haas case would be upheld under the recent rulings, as enunciated by the Supreme Court in Escobedo



and Miranda.

The word "voluntary" as defined in Webster's Unabridged Dictionary, means "brought about by one's own free choice". The evidence obtained from the Appellant's dwelling was clearly obtained while he was under arrest and at the express request of the Postal Inspectors. Appellant's act in going to his dwelling, after he had been arrested, was clearly not voluntary because the moment that he was arrested he was subject to the will of those whose custody he was in, i. e. , the Postal Inspectors. Appellant's refusal to do anything after he had been taken into custody would have amounted to resisting arrest.

The Government places great stress upon the fact that no force was used upon the Appellant. The tenor of this argument tends to imply that the Postal Inspectors are to be congratulated for not having used force upon Neggo. Quite to the contrary, the law expressly prohibits them from using force, where none is exerted by a suspect, and all that they were doing is being civilized, to some extent.

## V

### APPELLANT WAS NOT ARRAIGNED IN A TIMELY MANNER.

---

The evidence presented clearly shows that the arrest had been made at approximately 4:20 P. M. on January 27, 1966. No effort was made to have the Appellant arraigned immediately after





his arrest. Appellant was in the custody of the Postal Inspectors for approximately two hours, at which time they searched his dwelling and questioned him. No effort was made of any kind by them to have him brought before a Commissioner or to release him or to book him. One of the Inspectors testified that he could have taken him to the County Jail and booked him, but decided not to. The evidence clearly indicates that Neggo was being questioned for an extensive period of time, after his dwelling had been searched, at the postal station. It is respectfully submitted that the conduct of the Postal Inspectors clearly indicates that the reason for their failure to arraign Appellant was not due to their inability to do so, but because of their desire to obtain a full written confession from him.

### CONCLUSION

In conclusion, it is respectfully submitted that more than one reason exists for the reversal of this case. The actions of the Postal Inspectors unquestionably violated both state and federal law and, therefore, the judgment of the Trial Court must be reversed.

Respectfully submitted,  
CHARLES A. LAUFER  
Attorney for Appellant



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Charles A. Laufer  
CHARLES A. LAUFER



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

UNION PACIFIC RAILROAD COMPANY, a corporation,  
and MARK FLETCHER,

Appellants,

-VS-

JOHN W. JARRETT and JUANITA F. JARRETT,

Appellees.

---

BRIEF OF APPELLANTS

---

Appeal from the United States District Court,  
District of Idaho, Southern Division

---

FILED

JAN 1 1967

WM. B. LUCK, CLERK

BRYAN P. LEVERICH,  
Salt Lake City, Utah  
E. C. PHOENIX  
D. A. BYBEE  
F. L. RINGE  
Pocatello, Idaho

Attorneys for Appellants.





# SUBJECT INDEX

	Page
I. Statement of the Pleadings and Jurisdictional Facts.....	1
II. Statement of the Case .....	3
III. Questions Presented and Manner in Which Raised .....	6
IV. Specification of Errors .....	7
V. Summary of the Argument With Points and Authorities .....	8
VI. Argument	
1. Facts Reviewed .....	12
2. Trains Not Required to Travel So As to Stop Within Range of Vision .....	13
3. Drivers Must Look and See Effectively When Approaching Railroad Crossings .....	14
4. Failure to Stop at Stop Sign is Negligence Per Se and in This Case, Constitutes Sole Proximate Cause of Accident..	14
5. Act of Jury in Finding Against Driver Establishes Intentional Act or Gross Negligence on His Part, Super- seding Prior Acts of Appellants as Proximate Cause .....	18
6. Court May Review Evidence and Reverse Lower Court or Grant New Trial .....	24
7. No Question Here of Joint or Concurrent Tortfeasors .....	23
8. New Trial Should be Granted if Judgment Not Reversed Because Verdict Contrary to Evidence .....	24
9. Size of Jury Award Excessive and Indicates Given as Result of Passion or Prejudice .....	25
VII. Appendix .....	a. b. c.

# TABLE OF AUTHORITIES CITED

CASES	Pages
Bailey vs. Erie R. Co. (Ohio) 143 F. Supp., 351 .....	10
Bazzell vs. Atchison, T. and Santa Fe Ry. Co., 134 Kansas 272, 5 P. 2d, 804 .....	17
Burch vs. Gilbert, 148 So. 2nd 269.....	30
Bush Const. Co. vs. Walter, 164 So. 2nd 900 .....	30
Chatterton vs. Pocatello Post, 70 Idaho 480, 223 P. 2nd 389, 20 A.L.R. 2d 783.....	21, 22
Clark vs. Christ, 72 Idaho 340, 241 P. 2nd 171.....	21
Checketts vs. Bowman, 70 Idaho 463, 220 P. 2nd 682 .....	11, 27, 28, 29, 30
Conner vs. Penn. R. Co., (Pa), 163 F. Supp. 718, affd. 263 F. 2d 944 .....	13
Coughran vs. Hickox, 82 Idaho 18, 348 P. 2d 724 .....	20, 21
Covey Gas and Oil Co. vs. Checketts, (9th Cir.), 187 F. 2d 561 .....	11, 26, 27, 28, 29, 30
Dagnello vs. Long Island RR Co, (2nd Cir.), 289 F. 2d 797 .....	26
Deere vs. Southern Pac. R., (9th Cir.), 123 F. 2d 438, Cert. Den. 315 U. S. 819, 86 L Ed 1217.....	15
Domingo vs. Phillips, 87 Idaho 55, 390 P. 2d 297 .....	11
Drury vs. Palmer, 84 Idaho 558, 375 P. 2d 125 .....	9, 11
Hart vs. Wabash R. Co., (7th Cir.), 177 F. 2d 492.....	11
Hepp vs. Ader, 64 Idaho 240, 130 P. 2d 859 .....	26, 27, 29
Hickert vs. Wright, Kansas, 182 Kansas 100, 319 P. 2d 152.....	19
Hickey vs. Mo. Pac. Ry. Corp., (8th Cir.), 8 F. 2d 128 .....	11
Howard vs. Missman, 81 Idaho 82, 337 P. 2d 592 .....	9
Ineas vs. Union Pac. R. Co., 72 Idaho 390, 241 P. 2d, 1178 .....	9, 10, 11, 14
L. and N. RR Co. vs Fisher (Ky), 357 S.W. 2d 683 .....	21
LeBoeuf vs. Newman, 251 N.Y.S. 2nd 72 .....	30
McCracken vs. Richmond, F. & P. Ry. Co., (4th Cir.), 240 F. 2d 484 .....	24
McIntire vs. Oregon Short Line R. Co., 56 Idaho 392, 55 P. 2d 148 .....	9
Megan vs. Stevens, (8th Cir.), 91 F. 2d 419, 113 ALR 992 .....	11
Moran vs. Washington, Idaho & Mont. RR Co., (9th Cir.), 279 F. 2d 935 .....	17, 18
Mundy vs. Johnson, 184 Idaho, 483, 373 P. 2d 755 .....	11
Northern Pac. Ry. Co. vs Mealy, (9th Cir.), 219 F. 2d 199 .....	24
Orsbon vs. Balt. & Ohio R. Co., (Ohio), 206 F. Supp. 356 .....	14
Owens vs. Chicago, Rock Is. & Pac. R. Co. (10th Cir.), 292 F. 2d 696 .....	13

Ralph vs. Union Pac. R. Co., 82 Idaho 240, 351 P. 2d 464 .....	9, 13, 14, 16, 20
Ranstrom vs. Oregon Short Line R. Co., 18 F. Supp. 256 .....	22
Rowe vs. Northern Pac. Ry. Co., 52 Idaho 649, 17 P. 2d 352 .....	16
Smith vs. Sharp, 82 Idaho 420, 354 P. 2d 172 .....	22
State vs. Papse, 83 Idaho 358, 362 P. 2d, 1083 .....	9, 21
Stowers vs. Union Pac. R. Co., 72 Idaho 87, 237 P 2d 1041 .....	9, 18
Tedrow vs. Fort Des Moines Community Services, Inc., 117 N.W. 2d 62 .....	30
Testo vs. O.W.R. & N. Co., 34 Idaho 765, 203 Pac. 1065 .....	10
United States vs. First Security Bank of Utah, N.A. (10th Cir.), 208 F. 2d 424, 42 A.L.R. 2nd 951 .....	19, 20
Werth vs. Tromberg, Idaho 1965, 409 P. 2d 421, 425 .....	21
Whiffin vs. Union Pac. R. Co., 60 Idaho 141, 89 P 2d 540 .....	9, 10, 11, 14
Yearout vs. Chicago, Milw., St. Paul & Poc. R. Co., 82 Idaho 466, 354 P. 2d 759 .....	9, 17, 18

# TABLE OF AUTHORITIES CITED

## CODES

	Pages
Idaho Code:	
Section 5-310 .....	25
Section 5-311 .....	26, 27
Section 49-701 .....	13, b
Section 49-747 .....	8, 10, 13, 16, b.
Section 49-748 .....	10, 16, c.
Section 49-751 .....	16, c.
Section 49-1401 .....	10, 18
Section 62-412 .....	10
Title 28, U.S.C.A.:	
Section 1291 .....	2
Section 1332 .....	1

## RULES

Federal Rules of Civil Procedure, Rule 73 .....	2
---	---

## TEXTS

38 Am. Jur., Sec. 352, Pp. 1060-1 .....	10
44 Am. Jur., Sec. 511, p. 751 .....	13



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, A Corporation, )  
and MARK FLETCHER,

Appellants, )

-vs- )

JOHN W. JARRETT and JUANITA F. JARRETT, )

Appellees. )

---

APPELLANTS' OPENING BRIEF

---

STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS

This action was commenced in the United States District Court for the District of Idaho, Southern Division, seeking damages for the alleged wrongful death of Catherine Joan Jarrett, daughter of John W. Jarrett and Juanita F. Jarrett, Appellees. Appellees are citizens and residents of the State of Kansas (C.T. 6. All references hereinafter to "C.T." are to Clerk's Transcript, Volume One of Three Volumes of the record on this appeal). Defendants were the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher, a resident and citizen of Idaho, (C.T. 6) and Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, deceased, who was at his death a citizen and resident of the State of Idaho (C.T. 6). The amount in controversy exceeds \$10,000.00, exclusive of interest and costs (C.T. 7).

Jurisdiction of this action was founded on diversity of citizenship and the amount in controversy and results from the provisions of 28 U.S.C.A. Sec. 1332 (C.T. 7).



Jurisdiction for the review of this matter is conferred by the provisions of 28 U.S.C.A. Sec. 1291 and Rule 73, Federal Rules of Civil Procedure.

On October 12, 1964, John W. Jarrett and Juanita F. Jarrett instituted an action against the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher and Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased, seeking \$1,000.00 special damages and \$150,000.00 general damages alleging the same arose from the death of their daughter Catherine Joan Jarrett in a collision between a train operated by the Railroad Company and Mr. Fletcher and an automobile operated by decedent Herbert E. Nelson at a railroad crossing in Boise, Idaho on February 15, 1964. (C.T. 6-11). The collision was alleged to have occurred as the result of negligent, careless, wrongful, reckless and unlawful acts on the part of all of the defendants. (C.T. 9).

Separate answers were filed by the Union Pacific Railroad Company and its employee, Mark Fletcher (C.T. 22-27), and by Alma Nelson (C.T. 52-56). The case came on for jury trial commencing November 29, 1965 (C.T. 220). Motions for a directed verdict were made by appellants Union Pacific Railroad Company and Mark Fletcher at the conclusion of the plaintiffs' evidence (C.T. 223) and at the close of all of the evidence (C.T. 227) and denied each time. On December 2, 1965 the jury returned a verdict in favor of appellees and against all defendants in the sum of \$60,000.00 (C.T. 229), and judgment was entered thereon forthwith (C.T. 230).

On December 10, 1965, appellants filed their Motion for Judgment Notwithstanding the Verdict or for a New Trial (C.T. 235-238) which were by the Court denied on March 1, 1966 (C.T. 312), whereupon this appeal was taken from the final judgment and from the order denying said motion for judgment notwithstanding the verdict or for a new trial.

This Court is without jurisdiction to review that portion of the judgment which was entered in favor of John W. Jarrett and Juanita F. Jarrett and against

for the reason that the same has become final, no appeal having been taken by Alma Nelson.

### STATEMENT OF THE CASE

On February 15, 1964 at about 8:55 p. m., Catherine Joan Jarrett, daughter of appellees, entered the vehicle of Herbert E. Nelson to ride to Nelson's house to babysit for the Nelson children (RT 280-283. All references hereafter to R. T. " refer to the Reporter's Transcript, which are volumes two and three of the record on appeal). A Mr. Bradbury also was in the vehicle. They left the Jarrett house on South Wilson Street in Boise, Idaho where Catherine lived with her parents and two younger siblings, (R. T. 275, 276) drove east on Grover Street to Roosevelt street and turned north toward the home of Nelson (R. T. 201, 202). Several blocks later, they approached the tracks of the Union Pacific Railroad Company (R. T. 201, 203).

The streets were ice covered and extremely slick (R. T. 70). Mr. Nelson's car had been observed skidding as he turned onto Roosevelt, (R. T. 202) and it was seen slipping just before the accident (R. T. 78, 79, 204). After the accident, his blood alcohol content was measured at 149 milligrams (R. T. 301), at which level a man is intoxicated (R. T. 304).

As the Nelson vehicle approached the tracks, there was also approaching Train No. 12 of the Union Pacific Railroad Company, with Mark Fletcher acting as engineer (R. T. 130). This was a passenger train, with two motor units and seven cars (R. T. 150, 151). Its headlights were on, and also a swinging light called a Mars light (R. T. 158). There is evidence the engine bell was ringing and its whistle was blowing at intervals (R. T. 147, 148, 158). The train was moving between a speed estimated by the engineer at 55 to 60 miles an hour (R. T. 159) and approximately 6 miles an hour as indicated by the speed tape from the engine, Exhibit 27. A rail-



road speed limit in this area was 60 miles an hour (R. T. 137) and the train was slowing down for that and for the Boise depot about one and a half miles ahead, at which the train was to stop. There were no vehicles approaching the tracks on Roosevelt from the north and none on a parrallel street known as Alpine Street (R. T. 79). Roosevelt Street intersects with Alpine Street just south of the tracks. At the intersection of the two streets and the railroad tracks there is an overhead street light, a cross-buck railroad sign on either side of the tracks at the tracks and stop signs on either side of Roosevelt on Alpine, at the south side of Alpine on Roosevelt and at the north side of the railroad tracks on Roosevelt. The stop sign on the south is approximately 105 feet from the tracks, Exhibit 41.

A car somewhat ahead of the Nelson vehicle stopped at the stop sign and after the driver observed the train and noted it was far enough away not to be an immediate hazard, started up and drove over the tracks (R. T. 228, 229). The Nelson vehicle came up to the intersection without stopping at the stop sign (R. T. 169). For a brief moment its brake-lights flashed as it was skidding slightly, then it moved in front of the train and was struck at the left front portion of the vehicle (R. T. 75, 76). At the time it passed the stop sign without stopping, the train was approximately 60 feet from the crossing (R. T. 167).

There is a line of trees and bushes on the south side of Alpine west of Roosevelt, from which direction the train approached (Exhibit 40). The leaves were off the bushes and the tree branches are above eye level. There is a place where a driver could not see to the west along the tracks, but prior to reaching that point and after passing it, the driver could see at least to Garden Street to the west, approximately 1,300 feet (R. T. 350, 351). In the vicinity of the stop sign, or just past it, view is substantially unobstructed to the west for thousands of feet (Exhibits 21, 22). There are no distracting lights, or noises, or atmospheric or industrial conditions or factors which would obscure the headlights of the train or render its whistle signals indistinct.

At the time the first car went over the crossing, the train was in the vicinity of Garden Street (R. T. 229). One witness, Wood, who saw the train at that time, stated he did not hear a whistle at that time. He felt he could have heard one if it had blown, but at an earlier time he had given a written statement, which was introduced in evidence, that the whistle could have blown and he not have heard it because a wind was blowing away from the tracks, the heater was on and the windows were rolled up (R. T. 215, 216, Ex. 32). His daughter was paying no attention to his driving or the circumstances and did not even see the train (R. T. 119, 126). The driver behind the Nelson car, Mrs. Van Engelen, said she did not hear any whistles, but that they could have sounded and she not have heard them (R. T. 85).

All positive testimony about whistle signals was to the effect they were sounded. Mr. Leaper, called by appellees, lives by the crossing and said he heard them prior to the sound of the impact (R. T. 96, 104); Mrs. Nichols lives west of the crossing and remembers the train going by her house, whistling at the time (R. T. 378-82); young Danny Ramsey was playing outside and heard the whistles, then the sound of the impact (R. T. 374, 375). Mr. Leaper said he heard a screeching noise just before the impact like a car's tires spinning and Mrs. Nichols said after she heard the regular and usual whistles, the train whistled a peculiar, loud tone again. It is obvious these witnesses were referring to a last whistle blast just before the accident that the engineer also testified to.

The engineer and fireman testified to the operation of the train, stating that its speed was around 70 miles an hour as the train approached Boise, that an initial application of air was made to slow the train down gradually for the stop at Boise, that whistle signals are almost constant going through Boise because crossings are close but that the bell is turned on at the west edge of town and just left on (R. T. 129-184; 383-400). It was on at the time of the accident. The headlight of the train was on bright and the oscillating, or Mars, light also was shining, swinging back and forth from side to side (R. T. 387-390).



As the train approached Roosevelt street, the automobile had not yet reached the stop sign. The oscillating light was swinging over as far as the car and hitting it, but the car did not stop at the stop sign nor any place between there and the crossing. It was moving slowly and the engineer expected it to stop at any moment, but when it did not, he applied the brakes in emergency, which is all he could do to avoid the accident at that time (R. T. 158). The train stopped in about half a mile or longer. The impact threw the automobile to the southeast of the crossing, killing all three occupants (R. T. 259, 260).

Appellees produced evidence that Catherine was a good student and had a cheerful disposition, that they missed her very much and still felt grief over her death. No evidence was presented of any expectation of appellees that Catherine would contribute money to their support or that they were deprived of anything material. There are five married older children living away from home and two surviving younger children in the home.

#### QUESTIONS PRESENTED AND MANNER IN WHICH THEY ARE RAISED

The questions presented by this record are: Whether the admitted negligence of the driver of the vehicle in which Catherine Joan Jarrett was riding in failing to stop for the stop sign at the intersection of Roosevelt Street and the railroad track of the Union Pacific Railroad Company in Boise, Idaho on the night of February 15, 1964 and thereafter his failure to see and stop for the train which was then and there approaching either because he failed to look or Catherine failed to warn him or else he was driving too fast to stop, were intervening, superceding acts of negligence which constituted the sole proximate cause of the accident, so that acts of negligence on the part of the Railroad Company or the engineer Fletcher, if any, presented only conditions and thus there was no issue of negligence on the part of appellants to submit to the jury; and, whether even if there was an issue, there was no substantial evidence of negligence on the part of appellants to justify the verdict rendered, so

that a new trial should be granted appellants. These questions were preserved by motion for directed verdict, made both at the end of appellees' case (R. T. 329-333), and at the conclusion of all evidence (R. T. 401-407), and renewed in appellants' timely motion for judgment notwithstanding the verdict or for new trial (C. T. 235-38).

In addition, the question is presented as to whether, even assuming there was a justiciable issue as to negligence, the verdict and judgment are too high, and so gross as to indicate the jury was swayed by passion and prejudice. This question was reserved by appellants' timely motion for a new trial.

## SPECIFICATION OF ERRORS

### I.

The trial court erred in failing to grant the motion for directed verdict made by appellants at the close of the evidence of appellees, because there was no evidence of negligence on the part of appellants which was a proximate or contributing cause of the accident.

### II.

The trial court erred in failing to grant the motion for directed verdict renewed by appellants at the close of all of the evidence because there was no evidence of negligence on the part of appellants which was a proximate or contributing cause of the accident.

### III.

The trial court erred in failing to grant the motion for judgment notwithstanding the verdict for the same reasons set forth in paragraphs I and II above.

### IV.

The trial court erred in failing to give the instruction requested by appellants which reads as follows, as set forth in the statement of points under Rule 7 (6):



"You are instructed that if you find from all of the evidence that the collision between the automobile and the train would not have occurred except for the ice on the street, then the ice was the sole proximate cause of the accident, irrespective of the acts of the Railroad Company or its employees, and you must return a verdict for the defendant Railroad Company and its employee."

V.

The trial court erred in failing to grant to appellants a new trial on the basis that the verdict and the judgment entered thereon are not supported by substantial evidence as to these appellants.

VI.

The trial court erred in failing to reduce the judgment as being excessive and in failing to grant to appellants a new trial on the issue of damages, the amount of the verdict indicating that the jury was punishing all of the defendants for the gross and drunken behavior of the driver of the automobile, despite the fact that there was nothing appellants could do when Nelson drove through the stop sign and in front of the train to prevent the accident at that time.

SUMMARY OF THE ARGUMENT  
WITH POINTS AND AUTHORITIES

I.

Motorists are under a positive duty to maintain a lookout as they approach railroad crossings, from a place where their looking will be effective to see and hear what a person in the exercise of ordinary care and caution for the safety of himself and others would see and hear under like circumstances. Railroad trains have the right of way at crossings and Section 49-747, Idaho Code, imposes upon travelers a standard of conduct required of persons approaching railroad crossings, violation of which standard constitutes negligence per se, so that approaching a grade crossing without reducing speed and without having his vehicle under such control that he can stop for approaching trains, is negligence per se on the part of the driver herein. This oblig-

on also is imposed upon passengers, and failure by them to warn drivers or exercise care in looking or their acquiescence in the negligent operation of a car amounts to contributory negligence on their part.

Ralph v. Union Pac. R. Co., 82 Idaho 240,  
351 P. 2nd 464;

Ineas v. Union Pac. R. Co., 72 Idaho 390,  
241 P. 2nd 1178;

Drury v. Palmer, 84 Idaho 558, 375 P.2d 125;

State v. Papse, 83 Idaho 358, 362 P.2d 1083;

Howard v. Missman, 81 Idaho 82, 337 P.2nd 592;

Yearout v. Chi. M.St.P. & Pac. R. Co., 82 Idaho 466,  
354 P. 2nd 759;

Stowers v. Union Pac. R. Co., 72 Idaho 87,  
237 P. 2d 1041.

2.

The operators of trains are under no legal obligation to slow or stop a train at a grade crossing merely upon observing the approach of an automobile, and need not operate the trains prepared to stop under any circumstance which may arise. They have the right to believe that persons approaching a crossing will obey the law and will look and listen and stop where required, and will in any event stop and yield to a train its prior right of way over the crossing and this assumption is justified until there is some reasonable basis for believing the operator of the vehicle will not stop and yield. Failure to stop at a traffic control device requiring a motorist to stop, and to remain standing until safe to proceed, is violation of a statute designed to protect the traveler and is negligence per se.

McIntire v. O.S.L. R. Co., 56 Idaho 392,  
55 P. 2nd 148;

Ralph v. Union Pac. R. Co., supra;

Whiffin v. Union Pac. R. Co., 60 Idaho 141,  
89 P. 2nd 540;

Ineas v. Union Pac. R. Co., supra;

Testo v. O.W.R. & N. Co., 34 Idaho 765,  
203 Pac. 1065;

Section 49-747, Idaho Code;

Section 49-748, Idaho Code;

3.

Section 62-412, Idaho Code, the so-called "whistle statute" does not require an engineer to sound whistle signals in cities, and accordingly failure to do so in a city is not negligence per se. If a whistle is sounded in such fashion within a city as to give notice of the approach of a train to travelers in time enough for them in the exercise of ordinary care, to avoid the accident, then no negligence in the sounding of whistle signals can be found.

Section 62-412, Idaho Code;

Ineas v. Union Pac. R. Co., supra.

4.

No speed at which a train may be running justifies a traveler in going upon railroad tracks without looking and listening, effectively, for the approach of trains and exercising due care and caution, and the speed of the train in this case had nothing to do with the accident where the driver of the vehicle drove through a stop sign intended to prevent automobiles from driving onto tracks when trains were in hazardous proximity. Such act under the Idaho guest statute became a successive, intervening cause of the accident, which is a matter the court may determine as a question of law.

Section 49-1401, Idaho Code;

38 Am. Jur. Sec. 352, pp 1060-1;

Whiffin v. Union Pac. R. Co., supra;

Bailey v. Erie R. Co., DC, Ohio, 143 F. Supp. 351.



There is some testimony the driver of the car was having trouble controlling his car due to ice. If ice on the pavement prevented the driver from stopping, then irrespective of any acts of negligence on the part of defendants, the proximate cause of the accident was the ice and no issue remained to submit to the jury.

Whiffin v. Union Pac. R. Co., supra;

Ineas v. Union Pac. R. Co., supra;

Hickey v. Mo. Pac. Ry. Corp., 8th Cir. 8 F.2nd 128;

Megan et al. v. Stevens, et al., 8th Cir.,  
91 F. 2nd 419, 113 ALR 992;

Hart v. Wabash R. Co., 7th Cir., 177 F.2nd 492.

## 6.

Where there is evidence concerning the facts of an accident and how it happened, there is no presumption of due care. In this case, there were at least four eye witnesses to the accident, and no presumption exists in this case.

Mundy v. Johnson, 84 Idaho 483, 373 P.2nd 755;

Drury v. Palmer, supra;

Domingo v. Phillips, 87 Idaho 55, 390 P.2nd 297.

## 7.

An appeal court may review the verdict of a jury and if an award is excessive, or appears to have been given under the influence of passion or prejudice, it may grant a new trial or may order a reduction in the amount.

Checketts v. Bowman, 70 Idaho 463, 220 P.2nd 682;

Covey Gas & Oil Co., v. Checketts, 9th Cir.,  
187 F. 2nd 561.

A few comments are in order at this point regarding some of the facts set out above. Exhibits 21, 22 and 43 in evidence reveal the physical nature of the crossing and demonstrate that a motorist approaching from the south has at first a view through leafless branches an ever-widening distance to the west in the direction from which the train approached, and then when he reaches the area of the stop sign, either a little behind the one place where view might be obstructed to the west or a little ahead of it at the place Mr. Wood said he stopped and had a clear view to the west. (R. T. 228). the motorist can see at least to Garden Street a quarter of a mile west. (R. T. 229) Thus, the train involved in the collision would have been in view at all times while the Nelson vehicle approached the crossing, from a point at least 150 feet south of the tracks.

There are no public speed regulations at this location, only a railroad imposed limit for its own purposes because the area involved is within the yard limit (R. T. 137, 180) Speed of the train did not prevent it from being seen, nor were the trees and bushes any substantial obstruction to view as the exhibits referred to demonstrate. The little signal shack appearing in Exhibit 21 and the telephone poles and other poles on the right of way constitute no obstruction to view whatsoever, as reference to the exhibits will reveal.

The whistle testimony is such that no doubt is left that whistle signals were given and that at all times when the automobile was at or approaching or passing the stop sign, the signals were being sounded and the headlights of the engine were shining. Anyone in the vehicle who looked could have seen the train and anyone in it who listened could have heard the whistles. The failure to stop at the stop sign, or before reaching the tracks, can only indicate negligence on the part of the driver and all occupants of the vehicle. They were under the positive commands of Idaho law to look and listen and stop where necessary, not only in response to the command of the stop sign, prior to reaching the tracks, and failure so to do constitutes negligence.

Add the facts that the streets were icy slick and that motorists had trouble controlling their cars, and one reaches the inescapable conclusion that under the law as summarized above and the facts, the sole proximate cause of the accident was the successive, intervening negligence of the driver and his passengers.

### TRAIN NEED NOT TRAVEL PREPARED TO STOP AT ALL TIMES

It is immaterial whether or not the operators of the train knew of the street conditions in Boise. What could they do about it? Operating at a slower speed would not have prevented this accident. Weather conditions did not interfere with the operation of the train and going slower could not help travelers. It is not possible for trains to stop prior to reaching crossings under all circumstances and the distance required for this train to come to a stop shows it was not possible here. If trains had to operate so they could stop before reaching any particular crossing, it would mean that trains would have to move slower and slower as they approached each crossing until finally just before getting to it they would have to come to a complete stop to insure that some drinking driver who runs stop signs would not collide with them. Obviously, this is impossible. 44 Am. Jr. 511, p. 751. Conner v. Penn R. Co., 163 F. Supp. 718, 723, affd. 263 F. 2nd 944. The force of such an argument is that as motorists exercise less and less care, operators of trains must exercise more and more care. This never has been and is not now the law. Ordinary care does not require trains to be operated at such speeds that they can be stopped within the range of vision at a railroad crossing. Owens vs Chi, Rock Island & P. RR Co., 292 F 2d 696.

On the other hand, inclement weather is something a motorist must contend with in the operation of his vehicle, and where ice and snow make driving hazardous, a motorist must exercise increased care. Having the duty to approach at an appropriate reduced speed and being required to stop and yield the right of way to an approaching train, Sec. 49-747 and Sec. 49-701, Idaho Code, Ralph vs. Union Pac.



R. Co., 82 Idaho 240, 351 P 2d 464, 468, a motorist must drive at such speed as to be able to perform these duties. If extremely slick roads exist, motorists must drive so that they can stop safely and in time to avoid accidents. Orsbon vs. B. & O. R Co 206 F. Supp 356. If the roads are so slick that they prevent a motorist from stopping at a time when otherwise he could, then the ice and snow is the proximate cause of the accident. Ineas v. Union Pac. R. Co., 72 Idaho 390, 241 P. 2d 1178.

All of these remarks merely reflect the basic, standard Idaho law relating to railroad crossings. Idaho requires a motorist to look and listen and stop if necessary to do so effectively where his view is obstructed, and in any event, to look and listen and do so effectively from a place where to look or to listen is to see or hear. A landmark statement of the Idaho law follows:

"... A person approaching a railroad-highway crossing, a danger and itself a warning, is required to exercise reasonable care for his safety, and to look and listen from a place of safety, and if necessary to do so, stop and look and listen from a point where his observation is effective and from where had he looked he could have seen, or heard had he listened. He may not go onto the crossing without reasonably using his senses, and while in a place of safety must effectively look and listen and make sufficient careful observation to ascertain whether he may safely proceed before going upon the track in order to avoid any possible accident from approaching trains, and his failure to do so is not excused by the railroad company omitting its statutory duties ....."

Whiffin v. Union Pac. R. Co., 60 Idaho 141,  
89 P. 2nd 540, 546.

#### FAILURE OF NELSON TO STOP WAS PROXIMATE CAUSE OF ACCIDENT

The uncontroverted evidence here establishes that if the motorist had looked, he could have seen. His failure to see first the stop sign and then the train resulted either from his failure to look, or his looking without seeing, which is the same thing, either of which acts constitutes negligence as a matter of law. (see Cases cited following paragraph I, Summary of the Argument with Points and Authorities).

Such acts of negligence supersede any negligence on the part of the Railroad Company and Mr. Fletcher as the same were not concurrent with any negligence

on the part of appellants (although appellants deny they were negligent in any manner) but came when the effect of any acts or omissions on their part had come to rest legally, and the effect of the negligence of the driver in failing to stop for the stop sign was just commencing. There was nothing at that time which the Railroad Company and Mr. Fletcher could have done to avoid the accident. The train was only 600 feet - less than 6 seconds - away from the collision, and the testimony is that it was then sounding its whistle and that the headlights were bearing down on the car. Although well lighted, the train could have been going 20 or 30 miles an hour with a brass band playing on the cow-catcher and this accident still would have occurred. Nothing the Railroad Company or Mr. Fletcher did or did not do caused an intoxicated driver to run a stop sign and drive in front of a brightly lighted, plainly visible train which, because of its speed and proximity, was an immediate hazard at the crossing.

The only negligence other than speed claimed by appellees so far as the appellants are concerned is some vague and disputed negative testimony that the witnesses noticed no whistles. Such is not even the kind of negative testimony which may create an issue when opposed by the positive testimony of witnesses presented both by appellees and appellants that whistles definitely were sounded. A scintilla of evidence is not enough to raise a jury issue. Deere vs. So. Pac. R., 9th Circ., 123 2d 438, cert. den. 315 U. S. 819, 86 L Ed 1217.

But as to speed, appellants assert speed has nothing to do with the accident and evidence about it does not raise an issue of negligence on the part of appellants. The Railroad Company had a right to run its trains at this speed - no ordinance or state law prevented it. The crossing and those on either side were protected either by stop signs or by flasher lights and knowledge of this situation surely permitted Mr. Fletcher and the Railroad Company to rely on motorists obeying the law. What would operators of a train foresee at crossings protected by stop signs, other than that motorists would obey the signs and yield the right of way to trains? Should Mr. Fletcher be charged



with foreseeing that Nelson would become intoxicated and drive through the stop sign without stopping on glare ice streets at a speed where he could not stop, even though at the stop sign the train would be readily visible and easily heard?

Up until the stop sign was reached, there was no danger to Nelson and the occupants of his vehicle. Until he drove through the sign and proceeded toward the track, he might have stopped, or turned to the right or to the left. Until the intersection was passed, appellants had a right to believe he would turn or stop and yield the right of way to the train. Ralph vs Union Pac. R. Co., supra. The first time the operators of the train could possibly have had notice that Nelson was driving in a grossly negligent fashion was when he passed the stop sign, and by that time the accident was inevitable so far as appellants are concerned. Neither speed, nor additional whistle signals nor additional lights than those already shining ahead of the train could have prevented Nelson at that time from running in front of the train. Acts which create only conditions and do not proximately cause an accident do not create issues of fact. Rowe vs No. Pac. Ry. Co, 52 Idaho 649, 17 P2d 352.

Idaho law requires motorists to stop not less than 15 and not more than 50 feet from stop signs. Sec. 49-748, 49-747 (3) and (4) and 49-751 (d), Idaho Code. Not only must a motorist stop at stop signs, but he must remain there until safe to continue. With a rapidly moving train within a few hundred feet of the crossing, in plain view in hazardous proximity, obviously it would not be safe to start up again, so that it is apparent the act of Nelson in not stopping at the stop sign constituted the sole proximate cause of the accident, superseding any previous negligence on the part of appellants. As appellees' own witness Wood testified, he could see the train 1/4 mile away without difficulty when he stopped near the stop sign. He noted its speed and its location, saw it was safe and went ahead, but said if the train had been much closer he would not have gone ahead. (R. T. 228) Since the Nelson car was half a block or more behind him, it is obvious the train was plainly visible at the stop sign for anyone who obeyed the law and stopped and looked. Failure to do so was active,

positive, superseding negligence.

While it is the position of appellants that no evidence of their negligence which was a proximate or contributing cause to the accident has been presented, it must necessarily be their position that decedent Catherine Joan Jarrett was contributorily negligent. Arguably, it can be contended she had a duty to look and listen and to admonish the driver to heed the stop sign and the train, so that either she failed to perform these duties which Idaho law requires of her, Yearout v. Chi. M. St. P. & P. R. Co., supra, or else she performed them but Nelson would pay no attention and deliberately, intentionally tried to beat the train over the crossing. In either of these assumed situations, there would be no liability on the part of appellants.

In a case where suit was brought for the death of a daughter of plaintiffs and it was alleged the train was operated at an excessive speed, that view was obstructed, and that no warnings were sounded, the following instruction was held to be correct so that plaintiffs could not recover.

"If you find from the evidence in this case that before the automobile in which Lois Bazzell was riding entered upon the track of the defendant railway company, there was an opportunity for her to look and to see the approaching train, and if you further find from the evidence that if she had so looked, she could have seen the approaching train in time to have stopped, or caused to be stopped, the automobile, or warn the driver thereof of the approach of the train, and thereby prevented the collision which resulted in her death, then you are instructed that under the law it is presumed that she did see the approaching train and that it was her duty to immediately stop the automobile, or warn the driver thereof of the approaching train, and not to permit it to enter upon said track in front of said approaching train, if it were possible for her to do so, and failing in this her negligence in that respect will bar a recovery in this action".

Bazzell v. Atchison, T. & Santa Fe Ry Co.,  
134 Kansas 272, 5 P. 2nd, 804.

The same may be said here of Catherine, for even though she was a young girl she was old enough to keep watch and from the evidence was bright enough to see what went on around her. While the issue of contributory negligence on the part of a passenger at railroad crossings has been clouded by Moran v. Washington, Idaho & Montana RR Co., 9th Cir., 279 F. 2nd 935, a decision of this Court, there



is some doubt as to its viability. This case went entirely on the issue of contributory negligence of the passenger, holding that since the passenger had no control over the movement of the car, he could not be charged with negligent failure to look and listen.

However, almost on the same day that Moran was announced, the Idaho Supreme Court decided a similar case, *Yearout v. Chicago, Milw., St. Paul & Pac. R. Co.*, 82 Idaho 466, 354 P.2d 759, and went the other way. There was conflicting evidence as to view and whistle signals at a crossing where the occupants of the car were familiar but view was clear for the last 50 feet of approach to the tracks.

"However, through the course of the last fifty feet of their approach to the crossing, the occupants of the truck had a clear and unobstructed view along the track in the direction from which the train was coming. If plaintiff was watching for the train, which he said he was, under the rule as announced in *Stowers v. Union Pac. R. Co.*, supra, he was bound to see the plainly visible train. The truck traveling at the low rate of speed could have been stopped at any time during that last fifty feet of its approach to the crossing. Being thus charged with knowledge of the approaching train, in the absence of an emergency situation, it became plaintiff's duty to warn the driver. Plaintiff's failure to do so constituted contributory negligence (citing cases)". P. 763

#### VERDICT AGAINST DRIVER UNDER GUEST STATUTE ACTS TO ESTABLISH HIS NEGLIGENCE AS SOLE CAUSE

Since in a diversity case the Federal courts must apply the law of the state, it is plain the Moran case has little, if any, authority any more. It would seem that had the Idaho court decided the Moran case, it would have affirmed the lower court. This conclusion is bolstered by the Idaho guest statute. It was inconsistent for the jury to find against both Nelson and appellants, for if Nelson were guilty of negligence, appellants were not. The statute provides:

"49-1401. Liability of motor owner to guest. --No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or gross negligence".

For the jury here to return a verdict against Nelson, it was necessary

that his acts causing the accident to have been (a) intentional, in which case appellants could not have been liable, also; or caused by (b) his intoxication; or (c) his gross negligence, demonstrating that the same would be an intervening, superseding cause, coming as it did later than any acts of appellants which could have affected the outcome of the accident. Thus, if Nelson were liable, appellants could not be. Nelson did not appeal the judgment entered against the estate so that it has become final.

In a non-railroad case, Hickert v. Wright (Kansas) 319 P.2nd, 152, defendants had installed a tube in a tubeless tire and the tire blew out, causing an accident which killed a guest in the automobile. The driver was operating the vehicle at a high speed. Two headnotes state:

"Where two distinct causes of an injury are successive in time, the original act being simple negligence and the subsequent act being gross and wanton negligence, the subsequent act is an independent and efficient intervening cause which produced the injury".

"In action for death of guest in an automobile when a front tire blew out while being driven at a speed of 90 miles an hour brought against defendants who installed an inner-tube in a tubeless tire, amended petition failed to state a cause of action against defendants on ground that gross and wanton negligence of the driver of the automobile was an intervening efficient cause of the accident and that by reason thereof the defendants' negligence was relegated to the status of a remote act and that they were not liable".

In other words, the earlier, simple acts of negligence create only a condition. In our case any negligence on the part of Fletcher or the Railroad Company would be earlier, simple acts which became immaterial as soon as Nelson drove past the stop sign. His acts of driving too fast on icy streets and going through a stop sign without slowing or stopping at a time when he had a high blood alcohol content were decided by the jury, by reason of its entering a verdict against him, to be gross and wanton acts of negligence. Coming later in point of time, it is obvious Nelson's acts were the intervening efficient cause of the accident, and appellants' acts were made remote and non-contributory.

"The doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability for wrongdoing, and where original wrong only becomes injurious in consequence of



intervention of some distinctive intervening negligent act by others, the proximate cause of the injury will be imputed to the second wrongdoer if the intervening act would have caused the injuries independently of the original wrong".

U.S. v. First Sec. Bank of Utah, N.A., 10th Cir.,  
208 F 2nd 424, 42 A. L. R. 2nd 951

Nelson's drinking and his driving through the stop sign without exercising any care were acts not reasonably to be anticipated, and would have caused the accident in any event, regardless of what appellants had done.

We feel there is no joint or several negligence here and cases which turn upon that point are not in point. The thrust of our argument, as mentioned above, is that negligence on the part of appellants, if any and it is denied there was any, had ceased to be operative, and the sole, proximate cause of the accident was the negligence of the driver. Thus, how Nelson drove approaching the tracks is pertinent.

"He is bound to use his senses...If, using them, he sees a train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be case upon the railroad company..."

"These basic rules require, merely, that a person use his senses and that he drive his motor vehicle in a reasonable and prudent manner; and when coming up to a railroad grade crossing, that he look and listen, and stop until he can pass safely; and if he does not, and proceeds thoughtlessly upon the tracks, and thereby receives injury, his contributory negligence will forbid recovery, provided he was in a position that he could have looked, listened and stopped..."

Ralph v. Union Pac. R. Co., Idaho, 351 P.2nd 464

The existence of trees and bushes, which the exhibits reveal to be only temporary or casual view obstructions to anyone who looks for the moving, bright headlights of an engine, have no significance in view of the stop sign, since a motorist can ascertain while stopped whether it is safe to proceed, just as Mr. Wood did in the case. Failure to stop is violation of a positive duty, whether or not there was a stop sign:

"Having in mind the fact that defendant's view of the intersecting highway on his right was obstructed over the course of the last 100 feet of his approach to the intersection, it was his duty to drive at such

'an appropriate reduced speed' and have his car under such control, that he could slow down or stop as need be, when he reached a point where he could see a vehicle approaching from his right in such proximity as to give rise to the hazard of a collision should he proceed. I.C. Sec. 49-701..."

Coughran v. Hickox, 82 Idaho 18, 348 P.2nd 724.

Where there is a stop sign, the duty is even more demanding.

"The fact that defendant's view of Philbin Road to his right was obstructed, imposed upon him an additional burden of care, making it imperative that he stop at or near the stop sign, at a point where he could make an effective observation of the traffic on the Philbin road, before entering the traveled portion of that through highway."

State v. Papse, 83 Idaho 358, 362 P.2nd 1083, 1086.

Especially where there may be view obstructions is the duty to stop at the stop sign significant.

"Plaintiff insists that his view in that direction is blocked. Would the ordinarily prudent person under these conditions abandon all precaution and assume he had a clear field (which he knows he hasn't) or would he drive forward to a point where he could determine whether he was endangered by an approaching train?..."

"The circumstance of obscured vision imposed on Fisher more rather than less care." (citing cases)...

"...Unless it is due care to exercise no care to either see or hear at a railroad crossing, a jury could not justifiably find for the plaintiff. We are of the opinion plaintiff's decedent was contributorily negligent as a matter of law".

L. & N. R. Co. v. Fisher (Ky), 357 S.W. 2nd 683.

As was said in a recent Idaho case where an excuse for driving through a stop sign was given that trees and bushes made it difficult to see in that direction:

"The trial court should have instructed the jury that if Tromberg entered the highway in violation of I.C. Sec. 49-730 and of Werth's right-of-way, he was negligent per se... The trial court also should have instructed the jury that the difficulty of seeing through the trees would not have excused such negligence".

Werth v. Tromberg, Idaho, 1965. 409 P.2nd 421, 425.

Appellants contend there was no issue on proximate cause insofar as appellants are concerned to submit to the jury and that it was an error to do so.

"Negligence, to be actionable, must be the proximate cause, or a contributing proximate cause, of plaintiff's injury. Chatterton v. Pocatello Post, 70 Idaho 480, 223 P. 2nd 389, 20 A.L.R. 2d 783; Clark v. Christ 72 Idaho 340, 241 P. 2nd 171....."



"Ordinarily, the proximate cause of an injury is a question of fact for the jury or the court as trier of the facts (citing cases); but in the absence of evidence showing or tending to show a causal connection between defendant's negligence and plaintiff's injury, defendant, as a matter of law, cannot be charged with liability. *Chatterton v. Pocatello Post*, supra'...

"Where the facts established, or undisputed, and the inferences to be drawn therefrom, are such as to preclude reasonable doubt or difference of opinion, the question of proximate cause becomes one of law for the court. (citing cases)..."

"It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted is not the proximate cause thereof..."

"It is the well established rule of law that defendant's negligence is too remote to constitute proximate cause of an injury when an independent illegal act of a third person, which could not be reasonably foreseen and without which such injury would not have been sustained, intervenes...."

Smith v. Sharp, 82 Idaho 420, 354 P.2nd 172

The illegal act of Nelson in driving through the stop sign without stopping first was an act which could not reasonably be foreseen. The operators of the train are entitled to assume that travelers on the highway will obey the law. If Nelson had not driven through the stop sign without stopping, no injury would have been sustained. Thus, any acts or omissions of appellants merely furnished the condition or occasion upon which the injuries were received and did not put in motion the agency by which the injuries were inflicted.

As stated in a case where a passenger sued for personal injuries sustained when the automobile in which he was riding ran into a train on a crossing obscured by fog,

"... Even admitting the negligence of the defendant, where the negligence of the driver is the proximate cause of the accident, neither the driver nor his passenger can recover".

Ranstrom v. Oregon Short Line R. Co., (DC, Ida.)  
18 F. Supp. 256

Permitting the jury to speculate as to whether there was any negligence on the part of appellants which was the proximate cause of the accident, ignoring the fact that after Nelson failed to stop at the stop sign nothing further could be done by appellants to halt the accident, was error by the trial court. The act of determining in the first instance that no facts existed upon which to base a finding of negligence, or in the second instance, that even if some issue as to negligence could be created, there were no facts from which the jury could find that said negligence contributed to the accident, are conclusions which the trial court properly should have made.

This case does not involve a situation where negligence of two parties concurs to produce a single result, in which situation the accident would not have happened but for such concurrence, nor is it a situation where several causes produce a single injury of which each is an efficient cause, without which the injury would not have happened. Nor does this involve the combining of two independent torts to cause injury where there is no concert of action between the causes. A finding by the jury of negligence against appellants has no legal significance because the injury was caused by acts having no connection with the alleged acts of negligence of Mr. Fletcher and the Railroad Company; whereas a finding of negligence against Nelson serves to exonerate appellants because without his acts, the accident would not have occurred no matter what appellants did or did not do.

Under the circumstances here, where the crossing was protected by stop signs and other crossings in the area either by stop signs or flasher lights, where the operators of the train knew there was a stop sign at Roosevelt and were entitled to rely on drivers approaching the tracks to obey the law, where there were no county or city speed regulations, where over 100 feet of clear vision was afforded travelers after passing the stop sign and where earlier, view to the west was not entirely obstructed, where climatic conditions created a hazard for motorists on the



streets, where the driver of the accident car had 149 mg of blood alcohol in his system some time after the accident when the sample was drawn, and where the train was fully visible and in hazardous proximity when the driver drove through the stop sign, it is the contention of appellants that no facts exist upon which it can be said either Fletcher or the Railroad Company were negligent, and certainly none which contributed to the accident.

A judgment where plaintiffs have failed to make out a case against defendants, or where facts fail to justify a recovery, will be reversed by this Court.

Northern Pac. R. Co. vs. Mealy (9th Cir)  
219 F 2d 199

#### NEW TRIAL SHOULD BE AWARDED IF JUDGMENT NOT REVERSED

The trial court erred in failing to grant a new trial to appellants, even if for argument we assume it need not have granted the motion for judgment notwithstanding the verdict. First, a word about the fundamental difference between consideration of such a motion for judgment and a motion for new trial.

"...Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weight the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence is sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice".

McCracken v. Richmond, F. & P. Ry. Co., 4th Cir.,  
240 F. 2nd 484.

Considering all of the evidence, there can be no question the headlights on the engine were burning and the whistle blowing as the train approached the crossing. This is in accord with the observation of the trial judge. (R.T. 405) These facts, added to the unobstructed view afforded from the vicinity of the stop sign, and

the familiarity of the driver with the crossing, and his speed in approaching and in failing to stop for the stop sign, mean that the verdict of the jury against the Railroad Company and Mr. Fletcher was contrary to the weight of the evidence and for that matter, to the instructions of the court.

The facts do not need to be discussed again, nor the law applicable thereto. The situation here may be summarized in this fashion, perhaps: A motorist who had been drinking heavily drives too fast on slick, icy streets and at this excessive speed drives right through a stop sign without stopping and up onto tracks in front of a clearly visible, fast approaching train which is, at that moment, in hazardous proximity to the crossing, yet the jury finds against the engineer of the train and the Railroad Company. A new trial for Mr. Fletcher and the Railroad Company is warranted.

#### DAMAGES ARE EXCESSIVE

If the action is not reversed as to appellants, or a new trial is not granted, then the Railroad Company and Mr. Fletcher urge to the Court that the amount of the verdict in this action is so large and extraordinary that it surely must have been rendered under the influence of passion and prejudice, and is such as to shock one's conscience. Especially is this true in connection with the Railroad Company and Mr. Fletcher where there is little, if any, evidence of negligence which could be said, even remotely, to have contributed to the accident. The jury may well have felt some bitterness and disgust at the action of Mr. Nelson who was operating his vehicle as a drinking driver at too fast a speed in a grossly negligent manner. The jury seems to have been attempting to inflict punishment or retribution on the parties, but whatever the motive, the result far exceeds the bounds of justice and the permissive limits of the law.

The Idaho wrongful death statute provides:

"5-310. Action for injury to child. -- The parents may maintain



an action for the injury or death of a minor child, . . when such injury or death is caused by the wrongful act or neglect of another. . . ."

"5-311. -- Action for wrongful death. -- When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just". (emphasis furnished)

It will be noted at once that there is no particular standard contained in the statute by which to measure damages, although they must be "just" under all the circumstances. Damages are presumed, where there is a relationship. However, there must be some reasonable relationship between the injuries sustained and the damages awarded. Grief and anguish are not allowable items of damage. Hepp v. Ader, 64 Idaho 240, 130 P. 2nd 859.

The size of a jury award of damages can be reviewed by the appellate court. Dagnello v. Long Island R.R. Co., 2nd Cir., 289 F2nd 797. The decision of this court in Covey Gas & Oil Co. v. Checketts, 9 Cir. 1951, 187 F 2nd 561, 563, was cited therein to the same effect. It is stated in Dagnello:

"In some cases the very amount of the verdict is said to justify the inference that the verdict was brought about by passion or prejudice, although it seems to us that this is just another way of saying the verdict is too high." 289 F. 2nd 797, at 802.

In the Dagnello Case Judge Medina said the reason most appealing to him that the Seventh Amendment does not bar appellate review of the rulings of trial judges regarding new trials for excessiveness of verdicts is that "Without judicial supervision over what Blackstone called the 'misbehavior' of juries, a trial by jury would lack one of 'the essentials of the jury trial as it was known to the common law before the adoption of the Constitution'." Pg. 805.

The various words used by the different courts of appeal for reviewing the award such as "monstrous", "outrageously excessive", "shocking to the judicial conscience", he said, are just words of description, meaning really that the action

of the reviewing court must be sound, and not arbitrary, and that it must be "exercised in the light of the record in the case and within the limits prescribed by reason and experience". Pg. 802. The primary question then, is whether the verdict is too high.

The award in this case for a 14 year old girl was \$60,000.00. No proper person, of course, would take money in exchange for a child. Are there, then, no yardsticks to measure the amount? Admittedly, there are not very many, but there are some. For one thing, an award must be "compensatory to a damaged heir and not as a punitive measure to mulct the tort-feasor out of a penalty".

Hepp v. Ader, supra. Thus, the circumstances of the heir become pertinent. As well, there must be a reasonable relationship between the injuries sustained and the damages awarded. Checketts v. Bowman, 70 Idaho 463, 220 P. 2nd 682.

There are only a few cases in Idaho on the subject of damages awarded in wrongful death actions. One accident brought about two cases which are most instructive and which should be very persuasive in this court. An 8 year old boy was killed in an accident and his parents brought suit against the employer and his employee under the wrongful death action. Checketts vs. Bowman, supra. An award of \$40,000.00 was reduced to \$20,000.00. Following remittitur, plaintiffs dismissed and filed suit in Federal Court on the same claim. This time the award was \$35,407.50, and upon appeal this Court, in Covey Gas & Oil Co. v. Checketts, 9th Cir., 187 F. 2nd 561, reduced the award again to \$20,000.00.

In the state case the court considered what evidence would be pertinent to an award.

"Under the statute, 'such damages may be given as under all the circumstances of the case may be just'. 5-311, I.C. Elements entering into the determination of such damages include: Contributions which the parents might reasonably have expected to receive from the earnings of the deceased during his minority; and comfort, society and companionship deceased would have afforded to them had he lived. (citing cases)... Grief and anguish are not to be considered .... Some courts have broadened the base of allowable recovery to include loss of prospective comfort, care, protection and assistance during the common life expectancies of the parent and child".



It is unrewarding, of course, to consider other verdicts, since the circumstances vary so widely from case to case, and the law is varied from jurisdiction to jurisdiction, but the two Checketts cases should provide much guidance since they involve Idaho law and young minors. Even in the case of a boy, where parents reasonably can expect to obtain contributions from his earnings, prior to his reaching majority, and might reasonably expect to benefit from his comfort, society and companionship then and in later life, an award for the life of a younger child whose parents would live just that much longer was thought to be excessive when more than \$20,000.00. While there has been some change in the value of a dollar between 1951 and 1965, the comparison between \$20,000.00 for an 8 year old boy and \$60,000.00 for a 14 year old girl is rather startling and far in excess of any inflation the dollar has suffered.

It is unlikely that the young girl involved in our case would contribute anything to her parents during her minority. She would be a considerable expense to them, in fact, as girls are. While these facts do not change the question of liability, if it is thought to exist, they do have an effect upon the reasonableness and size of the award.

As well, here is a young girl who has 5 older sisters, all married and living away from home. The parents have moved to Kansas, away from these daughters. This young girl was attractive and if her older sisters are any indication would soon be married. Once she was married, any cause of action for her death would lie not in her parents, but in her own spouse and children, if any. Thus, the comfort, companionship and society which may be considered as being a basis for damages can be reasonably be anticipated by the parents only until the girl is married. And while after marriage she could provide as much comfort, companionship and society as any of her married sisters, this must be tempered by the demands her own family would make. The loss would be to her own household, not that of her parents. These are very real considerations which become pertinent under a statute

which permits reference to "all the circumstances" of the case.

Few of the elements set out in the Checketts case upon which damages could be based exist here. No contributions can be anticipated; prospective assistance and protection almost are non-existent. This means the only basis for the award of \$60,000.00 is comfort, society and companionship, present and future. There is no showing in the record of any special attributes which Catherine Jarrett had which would justify unusual or extraordinary damages from her loss.

If Catherine were, instead, a wage earner who left a family, loss of earnings, of contributions to the family and the direct benefit of care, training, protection and guidance would be present to support a substantial award. A wife might have to go to work. Children might be left fatherless. With a 14 year old girl, however, none of these things is present. All of these factors go to reveal not that no damages at all are shown, because damages are presumed, but that an award of \$60,000.00 is so far beyond any reasonable, logical, rational award that it can have been given only under passion and prejudice against the near-drunken driver who practically murdered the young girl. As far as the Railroad Company and Mr. Fletcher are concerned, however, there is no justification or even excuse for such an excessive award. To use the words of Judge Medina quoted above, this award is "just too high".

The testimony of Mr. and Mrs. Jarrett as to comfort, society and companionship, in fact, for the most part does not relate to those features but relates to grief and anguish instead, (R. T. 277, 279, 313, 314), and these are not items of damage as to wrongful death actions. This award far exceeds an amount which would be "compensatory to a damaged heir", Hepp v. Ader, supra. Especially is this true because what we are dealing with here is not the death of a father and husband, where there is a reasonable basis for estimating the loss of services, food, support and the like, but rather the death of a young girl who would be until her marriage an expense to the family and who would contribute nothing material to the family. While



appellants do not contend the award should be nominal, if one is thought to be justified at all, neither should it be "too much" and certainly \$60,000.00 is too much, especially when compared to the Checketts cases where both the state and federal court thought around \$40,000.00 was much, too much for a young boy.

There never has been an award in Idaho for anything even near the sum awarded in this case. This in itself should be indicative that the inflated money values of some communities do not apply in Idaho. But unless this Court is prepared to say there are no limits whatsoever to an award for the death of a 14 year old girl with no unusual talents who is making no contributions to her parents and who likely will be married and away from home soon, the award here is excessive.

Awards in other states and under other circumstances are not of much help to the court. A few are very large, but they are so few as to indicate they are maverick cases. Upon closer examination, most such cases are in states which permit grief, sorrow and anguish to be considered as elements of damage, contrary to the law in Idaho. Checketts v. Bowman, supra. On the other side of the coin are the many cases where excessive awards of this amount and lower have been reduced by the appellate courts. In fact, in no case which defendants can find during the last two years is there an award anywhere near the one in this case which has been permitted to stand, whether or not the state is among those considered "liberal" in its awards. For instance, \$22,500.00 for an 11 year old girl reduced to \$15,000.00 in Tedrow v. Fort Des Moines Community Services, Inc., (1963), 117 N.W. 2nd 62; \$20,000.00 for an attractive 8 year old girl reduced in Burch v. Gilbert (1963), 148 So. 2nd 269; \$75,000.00 for a 5 year old child held excessive and reduced in Bush Const. Co. v. Walters (1964), 164 So. 2nd 900; \$55,000.00 excessive for a 15 year old boy who earned money, contributed to the family expenses and bought all his own clothes, in LeBoeuf v. Newman (1964), 251 N.Y.S. 2nd 72, and so forth. New or old cases, remittiturs are common, as these cases do indicate, the determination being whether there is any rational justification for a large award. Appellants sub-


mit that in this action there can be no rational justification for an award of \$60,000.00, at least against the Railroad Company and Mr. Fletcher.



## SUMMARY

These appellants contend it was error for the trial court to submit the case to the jury insofar as the Railroad Company and Mr. Fletcher were concerned, there being no evidence of negligence on their part which was a proximate or contributing cause to the accident; further, that even if there was an issue, the verdict of the jury as to appellants was against the weight of the evidence and a new trial should be ordered. Even if a new trial is not required, the verdict as to the Railroad Company and Mr. Fletcher was so gross and excessive that a new trial should be ordered on that basis, or the amount of the verdict reduced to a more reasonable figure.

Respectfully submitted,



---

One of the Attorneys for Appellants  
Union Pacific Railroad Company  
and Mark Fletcher

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



---

Attorney

# APPENDIX OF EXHIBITS

<u>Exhibits</u>		<u>Description</u>	<u>Identified</u>		<u>Offered</u>		<u>Recd. or Rejected</u>
Pl's #	1	Aerial Photograph	R. T.	23	R. T.	24	RT 26
Def. #	2	Photograph	"	27	"	30	" 68
Def. #	3	Photograph (Rejected)	"	21	"	30	" 68
Def. #	4	Photograph	"	21	"	30	" 68
Def. #	5	Photograph	"	21	"	30	" 123
Def. #	6	Photograph	"	21	"	30	" 68
Def. #	7	Photograph	"	21	"	30	" 68
Def. #	8	Photograph	"	21	"	30	" 68
Def. #	9	Photograph (Rejected)	"	21	"	30	" 68
Def. #	10	Photograph	"	21	"	30	" 68
Def. #	11	Photograph (Rejected)	"	21	"	30	" 68
Def. #	12	Photograph	"	21	"	30	" 68
Def. #	13	Photograph (Rejected)	"	21	"	30	" 68
Def. #	14	Photograph	"	21	"	30	" 68
Def. #	15	Photograph	"	21	"	30	" 34
Def. #	16	Photograph	"	21	"	30	" 34
Def. #	17	Photograph	"	21	"	30	" 34
Def. #	18	Photograph	"	21	"	30	" 34
Def. #	19	Photograph	"	21	"	30	" 34
Def. #	20	Photograph	"	21	"	30	" 34
Def. #	21	Panoramic photograph	"	48	"	50	" 100
Def. #	22	Panoramic photograph	"	51	"	51	" 99
Pl's #	23	Report Card	"	109	"	109	" 109
Pl's #	24	Rules Book UPRR (Rejected)	"	133	"	134	" 134
Pl's #	25	Time Table, UPRR	"	135	"	135	" 135
Pl's #	26	Speed tape (rejected)	"	144	"	145	" 146
Pl's #	27	Speed tape	"	178	"	178	" 178
Pl's #	28	Picture of Miss Jarrett	"	186	"	187	" 187
Pl's #	29	Report Card	"	187	"	188	" 188
Pl's #	30	Report Card	"	191	"	191	" 191
Pl's #	31	Report Card	"	195	"	195	" 196
Def. #	32	Statement of Wood	"	213	"	213	" 215
Def. #	33	Lab report, blood test	"	238	"	239	" 302
Pl's #	34	Traffic count, Roosevelt Street (Rejected)	"	253	"	254	" 254
Pl's #	35	Traffic count, Roosevelt Street (Rejected)	"	255	"	256	" 256
Pl's #	36	Photograph	"	261	"	262	" 262
Pl's #	37	Photograph	"	261	"	262	" 262
Pl's #	38	Photograph	"	261	"	262	" 262
Pl's #	39	Photograph	"	261	"	262	" 262
Pl's #	40	Report Card	"	326	"	327	" 327
Def. #	41	Engineering drawing of crossing	"	335	"	336	" 336
Def. #	42	Photographs composing Exhibit 21	"	347	"	348	" 349
Def. #	43	Panoramic photograph	"	351	"	354	" 356

Section 49-701, Idaho Code. Basic Rule and Prima Facie limits.

(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all person to use due care.

(b) Where no special hazard exists that required lower speed for compliance with paragraph (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Thirty-five Miles per hour in any urban district;
2. Sixty miles per hour in other locations during the daytime.
3. Fifty-five miles per hour in such other locations during the night-time.

The prima facie speed limits set forth in this section may be altered as authorized in sections 49-702 and 49-703.

(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Section 49-747, Idaho Code. Railroad grade crossing - Obedience to signal indicating approach of train. -

(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within 50 but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

1. A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;
2. A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;
3. A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such



distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

4. An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

(b) No person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed.

Section 49-748, Idaho Code. All vehicles must stop at certain railroad grade crossings. -

The department of highways and local authorities with the approval of the department of highways are hereby authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad and shall proceed only upon exercising due care.

Section 49-751, Idaho Code. Stop signs and yield signs. -

(a) The department of highways with reference to state roadways and local authorities with reference to other roadways under their jurisdiction may designate through roadways and erect stop signs or yield signs at specified entrances thereto or may designate any intersection as a stop intersection or as a yield intersection and erect stop signs or yield signs at one or more entrances to such intersection.

(d) Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side of the intersection or in the event there is no cross walk shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection.



United States  
Court of Appeals  
For the Ninth Circuit

---

UNION PACIFIC RAILROAD  
COMPANY, a corporation, and  
MARK FLETCHER, *Appellants,*  
vs.  
JOHN W. JARRETT and  
JUANITA F. JARRETT, *Appellees.*

---

BRIEF OF APPELLEES

---

*Appeal from the United States District Court  
for the District of Idaho  
Southern Division*

HONORABLE FRED M. TAYLOR, Judge

---

BRUCE BOWLER  
244 Sonna Building  
Boise, Idaho 83702  
Attorney for Appellees

BRYAN P. LEVERICH  
Salt Lake City, Utah  
E. C. PHOENIX  
D. A. BYBEE  
F. L. RINGE  
Pocatello, Idaho  
Attorneys for Appellants

FILED

1957

WM B LUCK CLERK

---





## SUBJECT INDEX

I.	Statement of the Pleadings and Jurisdictional Facts	1
II.	Questions Involved and Manner Raised	1
III.	Summary of Argument with Points 1 to 5, and Authorities	4
IV.	Argument	4
	6. Railroad Has Duty of Prudent Operation	11
	7. Nelson's Acts Were Not Sole Proximate Cause of Collision, and There Was Concurrent Negligence	13
	8. The Verdict Against Nelson Is Not Fore- closure of Cause Against Appellants	39
	9. There Was No Error In the Trial Prejudicial to Appellants and New Trial Is Not Warranted	49
	10. \$60,000.00 for Loss of Catherine Jarrett to Her Parents Is Not Excessive	50
V.	Appendix	
	Opinion	a.
	Statutes	f.
	Exhibits	i.

## TABLE OF AUTHORITIES CITED

### CASES

	Pages
Anderson vs. Great Northern Ry. Co., 1908 15 Idaho 513, 99 Pac. 91	9, 53
Atlantic Coast Line R. Co. vs. Grimes, 1959 Ga. 109 SE2d 890	7
Bagwell vs. Southern Ry. Co., 1938 W.D. So. C. 21 F Sup 751	5, 35
Bazzell vs. Atchison, T. & S. F. Ry. Co., 1931 Kan. 5 P2d 804	39
Becham vs. Hines, 1922 6th Cir. Ky. Dist, 279 F 241	5, 21
Blisard vs. Vargo, 1961 6th Cir. Mich. D.C. 286 F2d 169	9, 64

Bunker Hill and Sullivan Mining and Concentrating Co. vs. Polak, 1925 9th Cir. Idaho D.C. N.D. 7 F2d 583 .....	5, 35
Butler vs. Townsend, 1931 50 Idaho 542 298 Pac. 375 ....	9, 54
Checketts vs. Bowman, 1950 70 Idaho 463, 220 P2d 682 .....	10, 63, 69, 70
Conner vs. Penn R. Co., 1959 3rd Cir. E.D. Penn. 263 F2d 944 .....	11
Covey Gas & Oil Co. vs. Checketts, 1951 9th Cir. D. Idaho 187 F2d 561 .....	10, 69
Dagnello vs. Long Island R.R. Co., 1961 2nd Cir. S.D. N.Y. 289 F2d 797 .....	10, 70
Dale vs. Jaequer, 1927 44 Idaho 576 258 Pac. 1081 .....	27
Ellis vs. Ashton and St. Anthony Power Co., 1925 41 Idaho 106, 238 Pac. 517 .....	10, 68
Fleenor vs. Oregon Short Line R.R. Co., 1909 16 Idaho 781, 102 Pac. 897 .....	5, 7, 8, 22, 44
Hayward vs. Yost, 1952 72 Idaho 415, 242 P2d 971 .....	9, 60, 63
Hepp vs. Adder, 1942 64 Idaho 240, 130 P2d 859 .....	9, 52, 55, 58, 60, 63
Hickert vs. Wright, Kan. 319 P2d 152 .....	41
Ineas vs. Union Pac. R. Co., 1952 72 Idaho 390, 241 P2d 1178 .....	12, 45
Jarrett vs. Wabash Ry. Co., 1932 2nd Cir. D.C. N.Y. E.D., 57 F2d 669 .....	6, 21
Johnston vs. Key System Transit Lines, 1959 Calif., 334 P2d 243 .....	8
Louisville and Nashville R. Co. vs. Fisher, 1962 Ky. 357 SW 2d 683 .....	27, 28
MacDonald Engineering Co. vs. Hoover, 1961 8th Cir. 290 F2d 301 .....	10, 71
Mann vs. Bowman Transportation, Inc., 1962 4th Cir. So. Car. D.C. 300 F2d 505 .....	9, 64
McCracken vs. Richmond, F. & P. Ry. Co., 1957 4th Cir. D.C. Vir. 240 F2d 484 .....	49
McKirdy vs. Cascio, 1955 Conn. 111 A2d 555 .....	10, 66
Miller vs. Union Pac. R. Co., 1933 290 U.S. 227, 78 Led 285 .....	6, 7, 32, 42, a.
Missouri Pac. R. Co. vs. Soileau, 1959 5th Cir. D.C. La. W.D. 265 F2d 90 .....	7, 22

Mock vs. Atlantic Coast Line R. Co., 1955 S.C. 87 SE 2d 830 .....	9, 65
Moran vs. Washington, Idaho and Montana Railroad Co., 1960, 9th Cir. Idaho D.C. C.D. 279 F2d 935 .....	5, 39, 42, 46
Nelson vs. Johnson, 1925 41 Idaho 697 243 Pac. 647 ....	10, 69
Northern Pac. R. Co. vs. Everett, 1956 9th Cir. D.C. Wash. 232 F2d 488 .....	6, 22
Olin vs. Honstead, 1939 60 Idaho 211 91 P2d 380 ....	5, 36
Orsbon vs. B. & O. R. Co., 1962 Ohio D.C. 206 F. Supp. 356 .....	12
Osier vs. Consumers Co., 1926 42 Idaho 789, 248 Pac. 438 .....	10, 68
Owens vs. Chicago, R. I. and P. R. Co., 1961 10th Cir. D. Kan. 292 F2d 696 .....	11
Patterson vs. Penn. R. Co., 1956 6th Cir. D.C. Mich. E.D. 238 F2d 645 .....	6, 21
Ralph vs. Union Pacific R. Co., 1960 82 Idaho 240, 351 P2d 464 .....	12
Ranstrom vs. Oregon Short Line R. Co., 1936 D.C. Idaho E.D. 18 F. Supp. 256 .....	26
Reinhold vs. Spencer, 1933 53 Idaho 688, 26 P2d 796 ....	10, 69
Rowe vs. Northern Pac. Ry. Co., 1932 52 Idaho 649 17 P2d 352 .....	26
Royal Crown Bottling Co. vs. Bell, 1959 Ga. 111 SE 2d 734 .....	9, 64
Sandifer Oil Co., Inc. vs. Dew, 1954 Miss. 71 So. 2d 752 ..	9, 65
Shelite vs. Chicago R. I. and P. R. Co., 1962 10th Cir. D.C. Kan. 307 F2d 49 .....	27
Short vs. Boise Valley Traction Co., 1924 38 Idaho 593, 225 Pac. 398 .....	10, 68
Smith vs. Sharp, 1960 82 Idaho 420, 354 P2d 172 .....	26
Southern Pac. R. Co. vs. Stephens, 1928 9th Cir. D.C. Cal. N.D. 24 F2d 182 .....	6, 21
Southern Pac. Co. vs. Guthrie, 1951 9th Cir. N.D. Cal., 186 F2d 926 .....	10, 70
Steinbock vs. Schieve, 1964 9th Cir. D. Oregon, 330 F2d 510 .....	10, 71
Stowers vs. Union Pac. R. Co., 1951 72 Idaho 87, 237 P2d 1041 .....	5, 19, 38

Union Pac. R.R. Co. vs. Johnson, 1957 9th Cir. D. Idaho 249, F2d 674 .....	10, 70
Valles vs. Union Pac. R. Co., 1951 72 Idaho 231 238 P2d 1154 .....	7, 8, 28, 30
Viehweg vs. Mtn. Sts. Tel. & Tel. Co., 1956 D.C. Idaho E.D. 141 F. Sup 848 .....	5, 36
Whiffin vs. Union Pac. R. Co., 1939 60 Idaho 141, 89 P2 540 .....	12
Woodman vs. Knight, 1963 85 Idaho 453, 380 P2d 222 ..	5, 35
Yearout vs. Chi. M. St. P. and Poc. R. Co., 1960 82 Idaho 466 354 P2d 759 .....	5, 39

## CODES

## Idaho Code:

Section 5-310 .....	9, 59, f.
Section 5-311 .....	9, 52, 59, f.
Section 49-1102 .....	8, 41, f.
Section 62-412 .....	5, 6, 16, 19, h.

## Title 28, U.S.C.A.

Section 1291 .....	2
Section 1332 .....	2

## RULES

## Federal Rules of Civil Procedure

Rule 50 (a) .....	33
Rule 50 (b) .....	33
Rule 73 .....	2

## TEXTS

5 Am. Jur. 781 Sec. 494 .....	46
38 Am. Jur. 938 Sec. 247 .....	46
52 Am. Jur. 448 Sec. 110 .....	35
52 Am. Jur. 452 Sec. 112 .....	35
127 A.L.R. 1455 .....	46
162 A.L.R. 9 .....	5, 20
14 A.L.R. 2d 550 Annotation .....	10, 67
A.L.R. 2d Supplemental Service 1965, page 152 .....	10, 67
8 Am. Jur. 2nd Automobiles Sec. 670 .....	46

No. 21,136

United States  
**Court of Appeals**  
For the Ninth Circuit

---

UNION PACIFIC RAILROAD  
COMPANY, a corporation, and  
MARK FLETCHER, *Appellants,*  
vs.  
JOHN W. JARRETT and  
JUANITA F. JARRETT, *Appellees.*

---

**BRIEF OF APPELLEES**

---

**STATEMENT OF PLEADINGS AND  
JURISDICTIONAL FACTS**

This action was commenced in the United States District Court for the District of Idaho, Southern Division, seeking damages for the alleged wrongful death of Catherine Joan Jarrett, daughter of John W. Jarrett and Juanita F. Jarrett, appellees. Appellees are citizens and residents of the State of Kansas (C.T. 6. All references hereinafter to "C.T." are to Clerk's Transcript, Volume One of Three Volumes of the record on this appeal). Defendants were the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher, a resident and citizen of Idaho, (C.T. 6) and Alma Nelson, Administratrix of the Estate of Herbert



E. Nelson, deceased, who was at his death a citizen and resident of the State of Idaho (C.T. 6). The amount in controversy exceeds \$10,000.00, exclusive of interest and costs (C.T. 7).

Jurisdiction of this action was founded on diversity of citizenship and the amount in controversy and results from the provisions of 28 U.S.C.A. Sec. 1332 (C.T. 7).

Jurisdiction for the review of this matter is conferred by the provisions of 28 U.S.C.A. Sec. 1291 and Rule 73, Federal Rules of Civil Procedure.

On October 12, 1964, John W. Jarrett and Juanita F. Jarrett instituted an action against the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher and Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased, seeking \$1,000.00 special damages and \$150,000.00 general damages alleging the same arose from the death of their daughter Catherine Joan Jarrett in a collision between a train operated by the Railroad Company and Mr. Fletcher and an automobile operated by decedent Herbert E. Nelson at a railroad crossing in Boise, Idaho on February 15, 1964. (C.T. 6-11). The collision was alleged to have occurred as the result of negligent, careless, wrongful, reckless and unlawful acts on the part of all of the defendants. (C.T. 9).

Separate answers were filed by the Union Pacific Railroad Company and its employee, Mark Fletcher (C.T. 22-27), and by Alma Nelson (C.T. 52-56). The case came on for jury trial commencing November 29, 1965 (C.T. 220). Motions for a directed verdict were made by appel-

lants Union Pacific Railroad Company and Mark Fletcher at the conclusion of the plaintiff's evidence (C.T. 223) and at the close of all of the evidence (C.T. 227) and denied each time. On December 2, 1965 the jury returned a verdict in favor of the appellees and against all defendants in the sum of \$60,000.00 (C.T. 229), and judgment was entered thereon forthwith (C.T. 230).

On December 10, 1965, appellants filed their Motion for Judgment Notwithstanding the Verdict or for a New Trial (C.T. 235-238) which were by the Court denied on March 1, 1966 (C.T. 312), whereupon this appeal was taken from the final judgment and from the order denying said motion for judgment notwithstanding the verdict or for a new trial.

This Court is without jurisdiction to review that portion of the judgment which was entered in favor of John W. Jarrett and Juanita F. Jarrett and against Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased (C.T. 230) for the reason that the same has become final, no appeal having been taken by Alma Nelson.

## **QUESTIONS INVOLVED AND MANNER RAISED**

The questions on this appeal are; was there sufficient negligence shown on behalf of the Union Pacific Railroad Company and its engineer Fletcher to warrant the trial court submitting the case to the jury, which was raised by conflicts in evidence between the train crew as to warnings, obstructed view, hazardous crossing, and speeds, and that

adduced through other witnesses and objective evidence of photographs, engineering drawing, and speed tape from the engine.

And was the jury verdict of \$60,000.00 too high, raised by appellants contention that it must have been rendered under influence of passion and prejudice resulting in a miscarriage of justice.

## **SUMMARY OF THE ARGUMENT WITH POINTS AND AUTHORITIES**

### **I.**

The negligence of Herbert E. Nelson was not the sole proximate cause of the collision, and his negligence was not imputable to Catherine Jarrett 14 years old who was riding in the back seat of the Buick sedan being taken by Nelson to his home to baby-sit. The facts concerning the negligence of the Railroad company and engineer Fletcher show that the train was being operated at 70 miles per hour at the point of impact, (Exhibit 27) that just before the application of emergency braking to stop it had been accelerating through urban sections of Boise (Exhibit 1) up to 73 miles per hour into hazardous crossing at Roosevelt Street with substantially obstructed view of motorist to the west from which the train was approaching, with railroad rules permitting 60 miles per hour speed (Exhibit 25), when the streets were slick from snow and ice. The warnings of whistle and bell were not properly and timely sounded as required by statute. The train movement was not prudently operated under the circumstances existing

with due and ordinary care, and such concurrent negligence combined with that of Nelson to constitute the joint tort liability as found by the jury on questions of negligence properly before them on behalf of the Railroad and Fletcher, as well as Nelson.

*Idaho Code, Section 62-412*

*52 American Jurisprudence 452 Section 112*

*Bunker Hill and Sullivan Mining and Concentration Co. v. Polak,*

1925 9th Cir. Idaho D.C. N.D. 7 F2d 583

*Baqwell v Southern Ry. Co.*

1938 W.D. So. C. 21 F Sup 751

*Woodman v Knight,* 1963 85 Idaho 453, 380 P2d 222

*Viehweg v Mt. Sts. Tel. & Tel. Co.*

1956 D.C. Idaho E.D. 141 F Sup 848

*Olin v Honstead,* 1939 60 Idaho 211 91 P2d 380

*Moran v Washington, Idaho and Montana Railroad Co.,* 1960, 9th Cir. Idaho D.C. C.D. 279 F2d 935

*Fleenor v Oregon Short Line R.R. Co.*

1909 16 Idaho 781, 102 Pac. 897

*Stowers v Union Pac. R. Co.,*

1951 72 Idaho 87, 237 P2d 1041

*Yearout v. Chi. M. St. P. and Pac. R. Co.*

1960 82 Idaho 466 354 P2d 759

162 A L R 9

*Becham v Hines,*

1922 6th Cir. Ky Dist. 279 F 241

*Miller v Union Pac. R. Co.*,  
1933 290 U.S. 227, 78 Led 285

## 2.

The operators of trains do have legal obligation to prudently operate trains at crossings to avoid injury and death to others, and they do not have unrestricted license to approach and go through crossing at whatever speeds they wish regardless of characteristics of the crossing such as the Roosevelt crossing in Boise urban district which was stop street for heavy traffic from Boise bench to downtown routing for bridge over Boise River, where the view of approaching train is obstructed to the motorist, and on February 15, 1964 at 8:55 P.M. Union Pacific mail and passenger train No. 12 was approaching the Boise passenger station when the streets were slick from fresh snow and the proper and required signal and bell warnings were not given by the train crew, and such failure to sound the statutory warnings is negligence per se.

*Idaho Code, Section 62-412*

*Jarrett v Wabash Ry. Co.*,  
1932 2nd Cir. D.C. N.Y. E.D., 57 F2d 669

*Southern Pac. R. Co. v Stephens*,  
1928 9th Cir. D.C. Cal. N.D. 24 F2d 182

*Patterson v Penn. R. Co.*,  
1956 6th Cir. D.C. Mich. E.D. 238 F2d 645

*Northern Pac. R. Co. v Everett*,  
1956 9th Cir. D.C. Wash. 232 F2d 488



*Missouri Pac. R. Co. v Soileau*,  
1959 5th Cir. D.C. La. W.D. 265 F2d 90

*Fleenor v Oregon Short Line R.R. Co.*,  
1909 16 Idaho 781, 102 Pac. 897

*Valles v Union Pac. R. Co.*,  
1951 72 Idaho 231 238 P2d 1154

*Atlantic Coast Line R. Co. v Grimes*,  
1959 Ga. SE2d 890

### 3.

The evidence is not clear that Nelson did not stop for the stop sign, it is clear that there was no stop sign for the railroad tracks and the only stop sign was for Alpine Street paralleling the tracks on their south, and there is evidence Nelson may have stopped for the stop sign and his view of the approaching train was substantially obscured by houses and trees before reaching Alpine, and after crossing Alpine, by the weeds, utility poles and signal house until it was too late for him to stop for the tracks. The jury did not have to find that the acts of Nelson resulting in the collision were intentional. Catherine Jarrett was not riding as his guest but was under his employment as a babysitter, and Nelson's negligence is not imputed to this girl who had no control over the operation of Nelson's car. Nelson's acts could not reasonably be found to be the sole cause of the collision which issue was properly submitted to the jury.

*Miller v. Union Pac. R. Co.*,  
1933 290 U.S. 227, 78 Led 285



*Valles v Union Pac. R. Co.,*  
 1951 72 Idaho 231, 238 P2d 1154  
*Idaho Code, Section 49-1102*

## 4

While the snow and icy condition of the streets was a part of the circumstances under which the collision occurred they could not be found to be the sole proximate cause of the injuries as contended by appellant. The District Judge did not err in refusing to give the requested instruction to this effect. The train operator was imprudent in failing to recognize the added hazard of the snow and ice to the already hazardous Roosevelt Street crossing because of obstructed view, no stop sign for the tracks, and expectant travel on a busy urban stop street, literally leaving no margin of safety for others at 73 miles per hour speed, and there was actionable negligence from failure to exercise reasonable care in order to avoid injury and death to others.

*Fleenor v Oregon Short Line R. R. Co.,*  
 1909 16 Idaho 781, 102 Pac. 897  
*Johnston v Key System Transit Lines,*  
 1959 Calif. 334 P2d 243

## 5.

Unless the verdict appears to have been given under the influence of passion or prejudice and a manifest miscarriage of justice would result from letting it stand there is no basis for new trial or reduction of the amount. There

is no evidence in this case that would bring the \$60,000.00 verdict within the rule. The trial court could plainly see there was no miscarriage of justice, and that the jury had properly followed the law in fixing damages as under all the circumstances of the case were just. The qualities of Catherine Jarrett whose life was taken and the characteristics that give those values to her mother and father who lost her society, companionship and comfort were fairly and legally evaluated by the jury, and the finding is not too much as contended by appellants.

*Idaho Code, Section 5-310*

*Idaho Code, Section 5-311*

*Hepp v Adder*, 1942 64 Idaho 240, 130 P2d 859

*Hayward v Yost*, 1952 72 Idaho 415, 242 P2d 971

*Anderson v Great Northern Ry. Co.*,  
1908 15 Idaho 513, 99 Pac. 91

*Butler v Townsend*, 1931 50 Idaho 452 298 Pac. 375

*Royal Crown Bottling Co. v Bell*,  
1959 Ga. 111 SE 2d 734

*Blisard v Vargo*, 1961 6th Cir. Mich. D.C. 286 F2d 169

*Mann v Bowman Transportation, Inc.*,  
1962 4th Cir. So. Car. D.C. 300 F2d 505

*Sandifer Oil Co. v Dew*, 1954 Miss. 71 So. 2d 752

*Mock v Atlantic Coast Line R. Co.*,  
1955 S.C. 87 SE 2d 830

*McKirdy v Cascio*, 1955 Conn. 111 A2d 555  
 14 A L R 2d 550 *Annotation Infant Death Damages*  
*A L R 2d Supplemental Service* 1965, page 152

*Short v Boise Valley Traction Co.*,  
 1924 38 Idaho 593, 225 Pac. 398

*Ellis v Ashton and St. Anthony Power Co.*,  
 1925 41 Idaho 106, 238 Pac. 517

*Osier v Consumers Co.*,  
 1926 42 Idaho 789, 248 Pac. 438

*Nelson v Johnson*, 1925 41 Idaho 697 243 Pac. 647

*Reinhold v Spencer*, 1933 53 Idaho 688, 26 P2d 796

*Checketts v Bowman*, 1950 70 Idaho 463, 220 P2d 682

*Covey Gas & Oil Co. v Checketts*,  
 1951 9th Cir. D. Idaho 187 F2d 561

*Southern Pac. Co. v Guthrie*,  
 1951 9th Cir. N.D. Cal., 186 F2d 926

*Dagnello v Long Island R. R. Co.*,  
 1961 2nd Cir. S.D. N.Y. 289 F2d 797

*Union Pacific R. R. Co. v Johnson*,  
 1957 9th Cir. D. Idaho 249 F2d 674

*Steinbock v Schieve*,  
 1964 9th Cir. D. Oregon, 330 F2d 510

*MacDonald Engineering Co. v Hoover*,  
 1961 8th Cir. 290 F2d 301

## ARGUMENT

### 6.

#### **Railroad Has Duty of Prudent Operation**

There is no contention that trains must be prepared to stop at all times, but 73 miles per hour approach to the Roosevelt Street crossing without warning of whistle and bell when the roads were icy and the motorist's view obstructed is not prudent operation or exercise of due care to avoid injury to others raising issues of negligence for jury consideration. The question is, was the train operated negligently under existing circumstances, and were there facts in evidence from which reasonable minds might differ to present jury question on such negligence. True there was no city ordinance setting a speed limit, and even the railroads rule of speed at this crossing at 60 miles per hour (Exhibit 25, pages 8 and 20, R. T. 137) would be too fast for prudence under existing circumstances. Warnings from the speeding train, lack of protection for the crossing, and obstructed view were all factors bearing on the railroad negligence. To say there could have been no negligence because the train could not have stopped for the crossing just does not consider the existing circumstances in accordance with the law applicable in these cases. *Conner v Penn. R. Co.*, 1959 3rd Cir. E. D. Penn. 263 F2d 944, and *Owens v Chiago R. I. and P. R. Co.*, 1961 10th Cir. D. Kan., relied upon by defense support this rule. The speed was a jury question in *Conner* holding warnings are part of the circumstances, and *Owens* lacked evidence to take the case

to the jury as there was no permissible inference of negligence where the train was traveling at less than the 30 mile speed fixed by the city. *Ralph v Union Pacific R. Co.*, 1960 82 Idaho 240, 351 P2d 464, relied upon by appellants is fully distinguishable on its facts warranting judgment notwithstanding verdict as it was a country crossing at 1:15 A. M. in October without ice or snow condition, the plaintiff driver of the car was guilty of manifest contributory negligence in approaching well marked crossing with unobstructed view of train running 35 miles per hour while she drove into the crossing at unreduced speed of more than 55 miles per hour. Likewise the defense authority of *Orsbon v B. & O. R. Co.*, 1962 Ohio D. C. 206 F. Supp. 356 where the plaintiff truck driver was found contributorily negligent in collision with train approaching the crossing at 22 miles per hour with diesel horn and bell sounded and no obstructions to motorist view located on railroad right of way, is no comfort to the appellants here. Clear daylight existed with no snow or ice, and plaintiff was held negligent as matter of law with no evidence of any negligence of defendant which could be considered proximate cause.

*Ineas v Union Pac. R. Co.*, 1952 72 Idaho 390, 241 P2d 1178, cited by appellants is not in point because there was a defense verdict of the jury where issue of contributory negligence was involvd. So to is *Whiffn v Union Pac. R. Co.*, 1939 60 Idaho 141, 82 P2 540, relied upon by appellants, not here controlling and is distinguished by issues of contributory negligence and there was an activated lighted wig-wag sigal warning to denote presence of the



train, and deceased motorist, whose husband brought action, had control of the car.

7.

**Nelson's Acts Were Not Sole Proximate of Cause of Collision, and There Was Concurrent Negligence**

Appellants argue that if Nelson had looked he could have seen the train. But in examining the evidence in this regard we find that from the position when stopped for the stop sign protecting Alpine Street running parallel to the railroad tracks there are trees and houses obstructing view of approaching train from motorist's left. (Exhibits 2, 4, 6, 7, 8, 10, 12 and 14). The stop sign is 100 feet from the south rail. (Exhibit 41) After proceeding north past the stop sign and into and across Alpine there would be good view to the left or westerly that could include view of the railroad tracks, but it must be noted that train lights approaching from the left could well be thought to be motor vehicles proceeding easterly on Alpine, and there would be no expectation that such would be traveling at speeds in ranges of 70 miles per hour. The street and the tracks run close together here. (Exhibit 1) After the motorist traverses the Alpine-Roosevelt intersection his view to the left of approaching rail travel as will be seen from the exhibits (supra) is dangerously obstructed. A most significant obstacle is the signal house which is situated 165 feet west of the crossing and effectively blocks any view until the front of Nelson's Buick was about 12 feet from the south rail, and was a constant blinder for the previous 10 feet at height of 9 feet (R. T. 340, Exhibit 41) couple



this with the electric wire poles and signal posts and weeds shown by the true perspective exhibits to be on the railroad right of way between the south boundary of the signal house and the north boundary of Alpine Street, and it can be seen why this was a dangerous and hazardous crossing of which the appellants should have been mindful as part of the existing circumstances when they chose to approach it at 73 miles per hour on February 15, 1964 when the city streets were icy and slick. These were facts for jury consideration as to any negligence of appellants. The panoramic photographs of the railroad (Exhibits 21, 22 and 43 did not fairly depict the view, (R. T. 49-52) but rather an expanded abnormal view, in distortion of the normal human vision views depicted by Exhibits 2, 4, 6, 7, 8, 10, 12, and 14. (R. T. 60, 61, 224, 225, 226)

The only direct evidence that Nelson did not stop for the stop sign for Alpine Street came from the train crew, (Engineer Fletcher, R. T. 146, 169 and Fireman Henderson, R. T. 389-391) yet a line of sight projection on Exhibit 41 would indicate that Fletcher could not even see where the stop sign was from the 600 foot position west of the crossing because of the trees obscuring his line of sight.

Mrs. Van Engelen, a disinterested witness, who was following Nelson's car testified she couldn't say whether he stopped for the Alpine Street stop sign, (R. T. 71, 78) she could not testify he did not stop. Mr. Leaper who says he heard, inside his house near the crossing, but did not see Nelson's car prior to the collision, two efforts of the car to make forward progress on the icy street. The first thing

that attracted his attention "was the screeching the car trying to get into motion" and it was in two parts "just like somebody that started up, and then started up again." This was the sound of whine of tires on the slick street. (R. T. 92 and 93) The first whine of the tires to get started could well have been his stop for the Alpine Street stop sign an inference the jury could have drawn from the evidence in conflict with the interested evidence of the train crew that he did not stop at the sign. This adds up that the evidence will not support appellant's contention that the sole proximate cause of the collision was a failure of Nelson to stop for the stop sign on Alpine. There was no stop sign for the railroad tracks and the stop sign for Alpine was 100 feet from the tracks. (Exhibit 41) The stop sign shown on Exhibit 41 near the cross buck is stop sign protecting Roosevelt Street and faced west bound traffic on Alpine.

Of course Nelson was negligent in failing to observe all the circumstances as they were, and to keep his car under proper control but the evidence will not support that the entire fault had to be, or was his. There were many factors on which reasonable minds might differ which made proper jury question for concurrent negligence of the joint torts which combined to cause the injuries. Important issues existed regarding the train operation failure to warn and its speed. Although appellant engineer testified they were slowing down for the Boise depot a little bit before Orchard Street crossing (R. T. 139) Orchard being one half mile or 2460 feet west of Roosevelt Street crossing,

and the depot is 4800 feet east of Roosevelt (Exhibit 1) the speed tape Exhibit 27 shows no lessening of speed at this course but a maintained speed of 73 miles per hour until the emergency application of the brakes which reduced the speed to 70 at the time of collision where the speed stopped registering at Roosevelt crossing. Appellant Fletcher had testified that he was only going about 55 miles per hour at emergency application. (R. T. 159) And he had told the investigating police officer Loomis he approximated his speed at 55 miles per hour at the time of the accident. (R. T. 266) Fireman Henderson testified they were running into Boise at 70 miles per hour before the first application of air for brakes was made in the vicinity of Orchard which reduced the speed there (First Federal Savings building) to 60, (R. T. 386 and 387) but Exhibit 27 showed the only speed of 60 to be as the train was picking up speed after the stop at Meridian. These made jury questions concerning conflicts in speed evidence.

On the question of failure to warn there is additional conflict in the evidence, and failure of warning by whistle or bell from the engine was by competent disinterested witnesses, even though the engine crew of course testified the bell was ringing and the whistle sounded. It is significant that appellant engineer did not testify that he sounded the statutory whistle warning 80 rods (1320 feet) before Roosevelt crossing (Idaho Code 62-412) his testimony being that when he saw Nelson's car 600 feet ahead of him he "was blowing the whistle as hard as I could blow, \* \* \* and "I went into emergency." (R. T. 158 and

167) The fireman Henderson did testify that the engineer did give the whistle warning for Roosevelt crossing but it began east of the Garden Street crossing which was 1320 feet west of Roosevelt, (R. T. 388, 389) and that the signal was two long a short and a long. (R. T. 395) They both said the train bell was started at the Perkins crossing (R.T. 159, 395) which was near the Boise junction west of Orchard, milepost B-450.7. (Exhibit 25 page 20) There is not evidence from the train crew that the statutory whistle warning was sounded 1320 feet west of Roosevelt crossing and a 73 miles per hour this would be essential to give motorist at Roosevelt timely warning of trains approach, and its lack would be negligence per se of the appellants. At the 73 miles per hour the train was traveling at 108 feet per second which gave 12 seconds between the Garden and Roosevelt Street crossings. (Exhibit 1, R.T. 229) This illustrates how important the statutory timely warning is and why speed is a factor of negligence under the circumstances.

The evidence of audible warnings of the speeding train to motorists is that Marvin Wood who drove across Roosevelt crossing first ahead of Nelson saw the train coming but did not hear whistle or bell, (R. T. 203, 204, 211, 222, 224) although he could hear the sound of the moving train and the collision. His daughter Sharon Wood who was riding with him and looked back to see the Nelson car head lights and the train collide and heard the bang did not hear any whistle or bell warning. (R.T. 112, 114) Mrs. Van Engelen driving the car following Nelson did not know



that a train was coming had not heard any train whistle or bell (R.T. 72, 73, 83) the first she had heard or saw of the train was when it collided with Nelson's car at the crossing. This evidence of failure of audible warning all came from disinterested witnesses with highest degree of credibility and they were in the best positions to know if the whistle and bell were in fact sounded in time to warn Nelson. Although some of the evidence on failure of warning was negative this made jury questions as to negligence of appellants. Marvin Wood who saw the collision in his rear view mirror testified that if the train had whistled he was "sure that I would have heard it." (R.T. 211) This was positive evidence that the warnings were not properly given in conflict with that of the train crew and produced jury question on appellant's negligence nullifying propriety for directed verdict. It was the jury's duty to decide which was the more credible evidence and most free from bias by personal interest, and these issues were properly submitted to the jury by the trial court. The witness for the railroad who testified about audible warning was Mrs. Dorothy Nichols who first learned of the accident after hearing the report on the radio she and her husband were listening to at the time. They lived on Alpine three houses west of Roosevelt crossing and usually heard trains go past the house but "don't pay too much attention." She heard a large screech sound which she thought was a whistle, and said "but the screech was what drew my attention." She did not hear the train's bell. (R.T. 378-381) Danny Ramsey, a ten year old boy playing army in the neighborhood with two other boys heard train whistle and impact but

did not look toward the train when it whistled making no evidence as to location of train when whistling (R.T. 373-375) Mr. Leaper was in his house east of the Roosevelt crossing on Alpine, and although he remembered hearing the whistle prior to the collision he "didn't hear a bell." (R.T. 96) and testified "I would say that it was a few seconds between the whistle and the thud." (R.T. 101) "Q. The whistle that you heard was just before you heard the sound of the impact? A. Yes, just before." (R.T. 103, 104) The whistle at this point could have no value as a warning and would be too late for anyone to have done anything about the impending collision. The evidence of whistling is linked most plausibly to the emergency after the engine was only 5 or 6 seconds from committed collision. The probative value of the evidence on audible warning at the proper time and place as related to motorists at Roosevelt crossing was proper jury question, and from these facts in evidence it could not be held as a matter of law that there could have been no negligence on the part of the railroad and its engineer to give the statutory warning signals for the crossing as required by Idaho Code 62-412. A jury question was obviously present, and a violation of this statute is negligence per se by rule of *Stowers v Union Pac. R. Co.* 1951 72 Idaho 87 237 P2d 1041, and *Yearout v Chicago, Milwaukee, St. Paul and Pacific R. W.* 1960 82 Idaho 466 354 P2d 759, and on such point this case held:

"The failure of the operators of a train to give the statutory signal is negligence per se; likewise the fail-



ure of a driver of a motor vehicle to comply with the statute is negligence per se. The evidence was conflicting as to whether the whistle was blown and the bell was sounded. We are bound by the juries finding against defendant on this issue.”

A 73 mile per hour pace through Boise City street crossings one block (80 rods, 1320 feet,  $\frac{1}{4}$  mile) apart allows only 12 seconds to give the whistle signal of two long, one short, and one long whistle soundings and demonstrates why slower speed is necessary for warnings to be effective to motorists within prudent train operation in discharge of duty to exercise ordinary care.

Even the negative evidence causes the conflict for jury question. There is extensive annotation on the probative force of testimony offered to show that crossing signals were not given on approach of train at 162 ALR 9. Appellees do not rely upon the scintilla doctrine; the testimony of Mrs. Van Engelen and Sharon Wood, who next to the train crew were in the best position to know, testified that they heard no whistle or bell, and likewise Marvin Wood that they were not sounded in substantial evidence of the failure of the whistle and bell warnings at the proper time. These eye witnesses to the collision supplied competent evidence for the jury question and support the test of whether upon the whole evidence adduced reasonable persons might reach different conclusions.

Upon the question whether bell and whistle were sounded, as claimed by appellants, the court is not required, in considering the propriety of directing verdict, to take into

account the superior means of knowledge possessed by the members of the train crew. While the testimony of train employees as to sounding of bell or whistle should not be discredited merely because of their employment, it cannot be accepted by the court as conclusive merely because they were in a position giving them better means of knowledge than other witnesses. Their credibility was solely for the jury. *Bechham v Hines*, 1922 6th Cir. Ken. Dist. 279 F 241.

*Jarrett v Wabash Ry. Co.* 1932 2nd Cir. D.C. N.Y. E.D. 57 F2d 699, was a crossing accident where there was issue as to whether the train gave the statutory crossing signals, and the court in affirming judgment on verdict for the plaintiffs in wrongful death action held:

“The testimony to the effect that the engine whistle was blown and the bell rung was given by employees of appellant, and, of course, their interest as such made their credibility a question of fact for the jury.” (citing authorities) *Accord Southern Pac. Co. v Stephens* 1928 9th Cir. D.C. Cal. N.D. 24 F2d 182.

In *Patterson v Pennsylvania R. Co.* 1956 6th Cir. D.C. Mich E.D. 238 F2d 645 a paving crew within half a block of the railroad crossing testified they did not hear an engine bell or whistle as the train approached the crossing. Railroad employees testified that the whistle on the train was loud enough to be heard three or four blocks away. Both the engineer and the fireman testified that the bell was rung and the whistle sounded, and the court in holding that a jury question was thus presented said:

“The Supreme Court of Michigan has held the testimony of several witnesses, though negative in character, that from positions at which they might have heard they did not hear crossing signals sounded, to be sufficient to carry the question to the jury. \* \* \* where a witness is in a position where he would normally hear, his failure to do so presents an issue as to the existence of the fact.”

Here the court also held that contributory negligence was also a jury question and reversed the District Court which had granted motion for judgment notwithstanding the verdict. In accordance is *Northern Pac. Ry. Co. v Everett*, 1965 9th Cir. D.C. Wash. 232 F2d 488 which holds that whether the engineer failed to sound the train whistle as required by law, and whether such failure to sound a timely whistle was a proximate cause of death from a train-car collision were jury questions. Accord *Missouri Pac. Ry. Co. v Soileau*, 1959 5th Cir. D.C. La. W.D. 265 F2d 90.

The old case of *Fleenor v Oregon Short Line R.R. Co.*, 1909 16 Idaho 781, 102 Pac. 897, although a pedestrian railroad crossing case contains important Idaho law in point with this Jarrett case covering elements of duty of care of a railroad in operation of its trains at crossings respecting speed and warnings and nature of the evidence thereof, and jury question from conflict on negative testimony, and the court in affirming judgment for widow of deceased husband killed by train at crossing held, according to the syllabus by the court:

“1. Where the plaintiff in an action for damages against a railroad company alleges several separate and independent acts of negligence as all concurring in the accident and consequent damages, and the acts charged are of such a nature that the accident might have occurred and the injury resulted from any one of such acts independently of any or all of the others, it will be sufficient to entitle the plaintiff to recover if he prove any act or acts alleged from which the jury may reasonably believe the accident occurred and the injury resulted.

2. As a general rule, the evidence of one who testifies to a negative is not entitled to the same weight as that of one who testifies to a positive. This general rule, however, is subject to the exception that where the evidence of an affirmative and positive issue necessarily consists in proof that a thing did not exist or an act did not take place, and the witness was placed under such circumstances and was in such position that he could as readily see and would as likely have seen or heard as the witnesses who testified that the act occurred or the thing did exist, then the testimony of such witness partakes of the nature of positive evidence and becomes proof of a positive issue.

3. Where witnesses testify positively that a bell was rung and a whistle sounded on a locomotive engine and that the engine was at the same time displaying a headlight, and other witnesses testify that they did not see a headlight and did not hear a bell or



whistle, and it appears from the evidence that the latter witnesses were looking and listening for the train and were in a position near the track where they could see and hear equally as well as the other witnesses, the evidence of those testifying to the negative is entitled to go to the jury and be considered by them the same as that of the witnesses testifying to the positive.

4. Where the employees of a railroad company are running a train over a public crossing at such a high and dangerous rate of speed as to become within itself negligent management and operation of the train and engine, and an accident results as a consequence thereof, or while such train is being operated at such high and dangerous rate of speed, it is proper for the evidence of such fact to be submitted to the jury, and for the jury to consider the same in determining whether or not the company was guilty of negligence in the resulting injury.

5. The fact that a railway train is run at a high and dangerous rate of speed at a street crossing is no excuse or justification for a person subjecting himself to the danger and hazard of being run over by attempting to cross the track in front of such train. The same duty to observe diligence and care at public crossings for the prevention of injury rests equally and alike on both the railroad company and pedestrians and other travelers crossing a railroad track, subject, however, to that other duty of pedestrians and other travelers crossing a railroad track to look and listen for

on-coming trains and to clear the track that they may pass without injury being inflicted.

6. The duty of a railroad company to ring a bell or blow a whistle in approaching a crossing is imposed by positive statute of this state, and a failure to do so is negligence per se; while the duty to maintain gates and station a flagman at a crossing is not enjoined by statute; still, under certain conditions and circumstances a failure to do so would constitute negligence at common law, for the consequences of which the company would be liable. Under all such circumstances the question of negligence in failing to maintain gates or keep a flagman at a crossing is a question of fact to be determined by the jury.

7. A prima facie presumption arises in the absence of evidence to the contrary that one who is killed while attempting to cross a railroad track at a public crossing stopped, looked and listened before going upon the track.

8. Where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence is one of fact to be submitted to jury. Where upon all the facts and circumstances there is a reasonable chance or likelihood of the conclusions of reasonable men differing, the question is one for the jury."



The case of *Smith v Sharp*, 1960 82 Idaho 420 quoted as authority for the defense contains no law as applied to its different facts that conflicts with the Jarretts' rights of recovery. This was action against the motorist and the city of Pocatello to recover for death of minors who drowned when the car was driven through a barrier at a dead end steet, and the demurrer to plaintiffs complaint was sustained with right to amend.

Accordingly in appellant's case of *Ranstrom v Oregon Short Line R. Co.*, 1936 D.C. Idaho E.D. 18 F Supp. 256 where demurrer was sustained to plaintiff's complaint, it is distinguished on its facts, being where recovery for injuries were sought where the motorist in a fog ran into the side of a train that was already passing through the crossing.

Also the case of *Rowe v Northern Pac. R. Co.*, 1932 52 Idaho 649 17 P2d 352 cited by appellants was where the motorist drove into a standing box car at a grade crossing in Moscow. These cases where the train already occupies the crossing are entirely different than the one at bar. Then the train is always straight ahead for the motorist to see, and of course there are thus different issues as to the proximate cause of the collision. We have a speeding train coming to the crossing with obstructed view and lack of audible warning and which hit the Nelson car after it was on the track.

It is true that Nelson had to be mindful of the railroad crossing and of course he was negligent as shown by the evidence but there is no evidence that he knew the train

was coming until it was too late by virtue of the lack of control over his car, but this negligence was not imputable to Catherine Jarrett. It could not be right to say the railroad had no responsibility for what happened under all the circumstances. This case is not within the facts giving rise to the decisions in *Dale v Jaeger*, 1927 44 Idaho 576 258 Pac. 1081 (contributory negligence of guest in auto accident) and *Shelite v Chicago R. I. and P. R. Co.*, 1962 10th Cir. D.C. Kan. 307 F2d 49, (where the court found there was evidence of contributory negligence of the deceased passengers) as there was no evidence of contributory negligence by Catherine Jarrett. Just because counsel in his brief contends there must have been contributory negligence by Catherine does not make such so, and the jury had this before them under proper instructions and the finding was to the contrary.

Defense authority of *Louisville and Nashville R. Co. v Fisher*, 1962 Ky. 357 SW 2d 683 is distinguished by being another situation where the action was for wrongful death of the car driver at the crossing and the court found he was contributorily negligent as a matter of law. Such might be precedent in this case if the heirs of Nelson were the plaintiffs, but even then under the Idaho rule his contributory negligence would be jury question. Another important point of distinction is that there was no issue of the whistle and the bell being sounded, the only witness to testify for the plaintiff heard not only the bell and whistle but the train itself when it was a half block away from the crossing.

The assumptions made by appellants that Miss Jarrett must have been responsible for her own death are just not consistent with any of the facts in evidence. Unfortunate as it was for the railroad to be linked in tort with Nelson there is no evidence to shunt the responsibility for what happened to Catherine Jarrett. To sustain this theory the contributory negligence of Catherine would have to be a legal presumption which of course is not the law. Even the *Fisher* case states the rule on this:

“The rule in such cases is that where there is no evidence, direct or circumstantial, of conduct of the injured party, indicium of his negligence, there is in death cases a presumption of due care on his part.” And the Yearout case *supra* adds that

“However, the negligence of the driver cannot be imputed to the plaintiff, since the plaintiff had no control, or right of control, over the driver in his operation of the truck. *Valles v Union Pac. R. Co.*, 72 Idaho 231, 238 P2d 1154; *Miller v Union Pac. R. Co.*, 290 U.S. 227 54 C. Ct. 172, 78 Led 285.”

*Valles v Union Pac. R. Co.*, 1951 72 Idaho 231 238 P2d 1154, is another authoritative joint tort action for injuries and death of minor occupants of automobile that was struck by the streamlinere at Weiser, Idaho on May 20, 1950 and suit was brought against the railroad and driver of the car Saturo Nakamura which resulted in judgment for the parents of the injured children, the holding affirming the judgment included:

“Witnesses for appellant testified the whistle on the streamliner was blown at various points as it was approaching the crossing. Witnesses for respondents testified they were in positions to hear and listen, did so, and heard no bell or whistle. There thus was a conflict in the evidence and this was question for the jury. *Hobbs v Union Pac. R. Co.*, 62 Idaho 58, at page 64, 108 P2d 841; 162 ALR 1054. Thus, and on the hereinafter analysis as to proximate cause the learned trial court properly denied appellants motion for non suit and directed verdicts.”

“Appellant contends, nevertheless, as its first assignment of error now before us, that Saturo Nakamura was guilty of contributory negligence in that he did not stop, look and listen when in a place of safety and that he could and should have seen the Streamliner. Appellant does not particularly stress that Saturo Nakamura’s contributory negligence was imputed to respondents’ decedents or Eligio, but perhaps sufficiently so presents it that we should dispose of it. The court instructed that Nakamura’s contributory negligence, if any was not imputed to decedents or Eligio (Inst. No. 10) but that decedents and Eligio were not absolved from exercising care for their own safety, (Inst. No. 14)”

“Decedents and Eligio were employees of Saturo Nakamura and his associates. At the trial Eligio testified through an interpreter. He suffered a concussion in the accident and remembered nothing of



the affair; the youths had no dominion or control over the driver and under the circumstances Nakamura's contributory negligence, if any, was not imputable to them." (citing authorities)

As in the appellants' opening brief in this Jarret case contention was made that the car driver's negligence absolved them of liability as being the sole proximate cause of the injuries but on this phase the Court in *Valles* holds:

"Appellant's main contention on this point is that Saturo Nakamura's contributory negligence was the proximate cause; that is, the fial, actual, intervening cause of the injury, which interrupted and cut off appellant's negligence if any, and therefore since there can be but one proximate cause, Nakamura's contributory negligence is the proximate cause which absolves appellant from liability."

"The relative distance of the Streamliner from the crossing when the engine thereof was visible to Saturo Nakamura from behind the retreating end of the westbound train; his speed in approaching and entering the crossing; when the engineer and fireman saw the automobile, and what, if any, might have been the effect upon Nakamura if the whistle had been sounded, were fully delineated.

"The solution of and factual conclusions to be drawn from, these various factors were clearly within the province of the jury."

The law of this case was held to be:

“A proximate cause is one from which the jury complained of is the ordinary and natural result, and is usual and might have been reasonably expected to occur from such cause.”

“ \* \* \* the proximate cause of an injury may be the concurrent negligent acts or omissions of two or more persons acting independently of each other.”

“ \* \* \* the negligence of any one of the defendants in order to render such defendant liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes, other than the plaintiff's fault, is the proximate cause of the injury. \* \* \* It is no defense to any one of the several defendants that the injury would not have resulted from his negligence alone, without the concurrent negligence or wrongful act of the other defendants.”

Within these rules of law the Union Pacific was not prudent to provide for its operation of their train at some 73 miles per hour through the Boise City crossings and should have foreseen that such violent accidents were likely to occur from the traffic that regularly used the crossing, and could there be normally expected. Engineer Fletcher should have foreseen the importance of reduced speed to avoid injury to others under the particular circumstances of slick streets and sound the statutory and railroad rule warnings. The failure of the whistle and bell to properly warn, the ex-



cessive train speed at obstructed view crossing were all evidence of negligence of the railroad and Fletcher which concurred with the negligence of Nelson by his improper car operation to be the proximate cause of appellees' daughter's death. Any conception of reasonable and ordinary prudence dictate these acts to be wrong and constitute negligence on behalf of all the defendants, and these were the facts properly before the jury on which the verdict was based.

The United States Supreme Court case of *Miller v Union Pac. R. Co.*, 1933 290 U.S. 227, 78 Led 285 is a leading authority on proximate cause for death of a person killed at a railroad crossing while a passenger in a car driven by a negligent motorist. And it was held that a railroad company cannot defeat recovery for the death of the wife, not herself chargeable with contributory negligence, when the car driven by her husband was struck by a train at a crossing, upon the ground that the proximate cause of her death was not its negligence, but the negligence of the husband in driving upon the track in face of the approaching train where the negligence charged against the railroad company was not only the failure to sound the whistle but the operation of the train at a dangerous speed, concurrent with the negligence of the husband.

Much of the controlling law of appellees' cases is found in this *Miller* case as concerns the issues on this appeal as the railroad defense theories are parallel, but the Supreme

Court in reversing denial of recovery for wrongful death of the wife passenger held as shown by the quoted portion of the court's opinion set out in the appendix.

This U. S. Supreme Court case has particular applicability to the situation of Catherine in Nelson's car, and as previously herein analyzed distinguishes entirely from the *Ineas* case, as there was no evidence whatever of any contributory negligence of decedent. The foregoing authorities show as applied to the facts in evidence that the trial court properly denied the appellants' motion for a directed verdict under Rule 50 (a) Federal Rules of Civil Procedure, and likewise the Motion for Judgment Notwithstanding the Verdict under Rule 50 (b). There was no error in the trial, and no occasion for correction.

The issues of the concurrent negligence which was the proximate cause of the injury were jury questions and decided by them in proper form of verdict which was not contrary to the evidence or law of the case as properly instructed by the trial court.

Appellants argue that only the superseding negligence of Nelson to any of their previous negligence had to be the sole proximate cause of the collision, but this theory does not fit the facts and the law.

The railroad provided its train to be operated at imprudent speeds in movement through Boise City at the Orchard, Garden and Roosevelt Street crossings which are high traffic and arterial city streets, (Exhibit 1) and failed to have any rule to slow down under hazardous circum-

stances to discharge its duty of ordinary care to avoid injury to others. The engineer Fletcher failed to give proper warning as required by law of his approach to the crossing, did not heed his duty of ordinary care to slow his train when he could see the streets were dangerously slick and that the view of his approach was obstructed to motorists approaching to his right. Nelson failed in his duty to keep his car under proper control to avoid the train hitting him at a dangerous railroad crossing. While there are issues as to these acts of concurrent negligence, and there can be no doubt that they constitute proper jury questions of proximate cause of the injuries. The test of negligence is that of prudence and due care under the circumstances of all those who participated in the events causing the injuries, and it could not fairly be said from the evidence that the jury could not find that the railroad, the engineer, and Nelson acted imprudently, and the jury specifically found against all under the theory of joint tort in which they were properly instructed on the law.

“A person who joins in committing a tort cannot escape liability by showing that another person is liable also; that a third person co-operated in the wrong is no justification for the misconduct of the defendant. The general rule as to this matter is that joint tortfeasors are jointly and severally liable. Hence, a tort jointly committed by several may be treated as joint or several at the election of the aggrieved party. All the authorities agree as to the applicability of these

rules where there is a breach of a common duty.” 52 American Jurisprudence 448 Section 110

“There is much authority in favor of the principle that joint, or more precisely, joint and several, liability may exist notwithstanding the absence of concerted action on the part of wrongdoers. Thus, where the independent tortious acts of two or more persons supplement one another and concur in contributing to the producing a single indivisible injury, such persons have in legal contemplation been regarded as joint tort-feasors, notwithstanding the absence of concerted action. This rule has been regarded as applicable as the acts are concurrent as to place and time and unite in setting in operation a single destructive and dangerous force which produces the injury.”

52 American Jurisprudence 452 Section 112

Accord *Bunker Hill and Sullivan Mining and Concentrating Co.*, 1925 9th Cir. Idaho D.C. Northern Div., 7 F2d 583. Also *Bagwell v Southern Ry. Co.*, 1938 W.D. South Carolina 21 F Sup. 751, a crossing accident case an action to recover damages for death of passenger in car with issues of train warning holds such situation joint tort.

*Woodman v Knight*, 1963 85 Idaho 453, 380 P2d 222 holds accordingly:

“Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery

may be had against any or all of the responsible persons."

*Viehweg v Mountain States Telephone and Telegraph Co.*, 1956, D.C. Idaho E.D. 141 F. Supp. 848, succinctly states the rule of proximate cause of joint tort thusly:

"The majority rule is that where the negligence of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concerted action." (citing many authorities.)

This Idaho rule of law is also stated in *Olin v Honstead* 1939 60 Idaho 211, page 223 as follows:

"It hardly requires the citation of authorities to the proposition that if the negligence of one tort-feasor concurs with the negligence of another to produce a single result, which would not have happened but for such concurrence, both tort-feasors are liable though their acts or omissions of negligence were independent of each other. (*Woodland v Portneuf Marsh Valley Irr. Co.*, 26 Idaho 789, 146 Pac. 1106; 62 C.J. 1133; *McDonald v Robinson et al.*, 207 Iowa, 1293, 224 N.W. 820, 62 ALR 1419. See, also, *Brose v Twin Falls Land & Water Co., et al.*, 24 Idaho 226, 133 Pac. 673, 46 L.R.A., N.S., 1187.)"

Most assuredly the appellants' contention that the verdict of the jury in finding against the Nelson estate was an exoneration of the railroad and the engineer, as they



thereby found the negligence of Nelson was the sole proximate cause is not consistent with the verdict under the instructions and the facts of the joint tort. There is no competent evidence that Nelson saw or heard the train until it was too late, and it would be incredible that he deliberately drove in front of the train inviting sudden death. Failure of timely warning and obstructed view of the speeding train had its effect on the position he obviously belatedly found himself in. Examination of the pictures and particularly Exhibits 14, 10 and 12 which illustrate the motorists view in the west direction of the approaching train, (R.T. 28, 29) show how difficult it would be to see the train only except when driving north across Alpine Street, and it is most significant that there was no stop sign for the railroad track proper. The line of sight as illustrated by the engineering drawing of the crossing Exhibit 41 shows the trees obstructions particularly respecting the engineer's testimony that he first saw the car 600 feet away.

This was a cold icy night, car windows would be rolled up and perhaps even steamed or frosted up, being part of the circumstances the railroad operation should contemplate in going through urban crossings bearing on their exercise of due care within the ordinary rules of prudence. Nelson could have mistaken the engine headlight for that of a car coming from the west on Alpine Street parallel to the railroad tracks, and of course would not anticipate that any car would be traveling at 73 miles per hour as the train was. The facts left by the dead people certainly indicate some confusion, it would be true that Nelson knew there



were railroad tracks there but there is no proof that he was not confused about the presence and speed of the train until it was too late. These are the facts in combination which the jury would have considered in rendering their verdict against the railroad and the engineer as well as against Nelson who too was negligent.

*Stowers v Union Pac. R. Co.*, 1951 72 Idaho 87 237 P2d 104, cited by defense is of no comfort to them, as there was a question of contributory negligence of the decedent as to advising the driver of the car that the way was clear, which the court held presented a jury question and reversing as error the trial court granting defense motion for judgment notwithstanding the verdict for the plaintiffs. This case states the law respecting judgment notwithstanding the verdict saying:

“Through a long and unbroken line of decisions this court has held that where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence, contributory negligence and proximate cause is one of fact to be submitted to the jury and not a question of law for the court; if, upon all the facts and circumstances, there is reasonable chance of likelihood of the conclusions of reasonable men differing, the question is one for the jury.” Citing many cases.

“The question of the existence of negligence and contributory negligence only becomes a question of law when the evidence is susceptible of no other reasonable interpretation than the conduct of the injured party contributed to his injury and that because of his negligence and carelessness he did not act as a reasonably prudent person would have acted under the circumstances. *Hobbs v Union Pacific R. R. Co.* 62 Idaho 58, 108 P2d 841.”

The case of *Bazzell v Atchison, T. & S.F. Ry. Co.*, 1931 Kan. 5 P2d 804, cited by appellants is no controlling authority on facts or law. It was a private country crossing the train speed was 55 miles per hour, the deceased girl was riding in the front seat with her brother and her contributory negligence was established by the evidence. *Yearout v Chicago, Milw., St. Paul & Roc. R. Co.*, 1960 82 Idaho 466, 354 P2d 759 relied so heavily upon by appellants to nullify application of the *Moran* case is not in point on the facts. Plaintiff Yearout riding in the seat of a truck driven by his son was found contributorily negligent as a matter of law as the train was clearly visible to him in time to act to prevent the accident. The train speed was 5 miles per hour at the crossing approach.

## 8.

### **The Verdict Against Nelson Estate Is Not Foreclosure of Cause Again Appellants**

The appellants contend that the finding of negligence and liability of Nelson by the jury foreclosed any cause

against the railroad by virtue of the Idaho guest statute, Idaho Code 49-1401. Their argument is another tack of reasoning on proximate cause. The case was not defended on theory of lack of liability for injury to guest and no instruction of the law in this regard was involved. The facts were that Catherine was employed by Nelson as a baby sitter and he was taking her to his home for that purpose. The law was correctly instructed by the trial court by Instruction No. 14 (R.T. 423) which says in its final paragraph:

“When the negligent acts or omissions of two or more persons contribute concurrently and as proximate causes to the injury on another, each of such persons is liable. This is true regardless of the relative blame or fault of each.”

The trial judge by Instruction No. 16 (R.T. 425) instructed:

“You are instructed that the negligence, if any, of the driver of the automobile in which Catherine Joan Jarrett was riding is not as a matter of law imputable to the decedent Catherine Joan Jarrett.”

Appellants' position that the jury had to find Nelson guilty of gross negligence under the guest statute consequently shifting all blame for the collision on him absolving the railroad of any responsibility is not borne out by the facts, the law, and the verdict made under proper instructions. There was nothing inconsistent for the jury to find both against Nelson and appellants. His blood alcohol

level was slightly below that which the Idaho Code 49-1102 presumes to be intoxicated. (Instruction No. 19, R.T. 429) This law provides that:

“3. If there was at the time 0.15 percent or more by weight of alcohol in the defendant’s blood, it shall be presumed that the defendant was under the influence of intoxicating liquor.”

Exhibit 33 shows that Nelson’s blood alcohol was .149 percent, enough to be intoxicated (R.T. 303) but below the statutory presumption, and Wilber Siegenbein testified he did not appear intoxicated, (R.T. 324) and this would have important bearing on the jury’s consideration of Nelson’s degree of negligence at the crossing. But this does not warrant appellants’ position that if Nelson were liable they could not be. That the Nelson estate did not appeal is not relevant to appellants’ joint tort liability. There is vast distinction from *Hickert v Wright*, Kan. 319 P2d 152, cited by the defense on issue of superseding or concurrent negligence where a faulty tire mounting was sought to be linked with later independent act of high speed and wreck from tire blow out, and a speeding train without proper warning striking motorist at busy urban grade crossing. The coming later in point of time was a matter of few seconds with appellants’ train running at 108 feet per second it cannot be rationally reasoned that appellants’ acts were remote and non-contributory within the rule that the doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability for wrongdoing. It is hard to imagine a better satisfaction of the continuity rule

for joint tort than in this Jarrett case. The timing sequence for proper whistle warning for Roosevelt crossing would be 12 to 15 seconds at just before the Garden Street crossing, hardly remote and independent, but actually a part of *res gestae*.

The proposition that passengers, guests or otherwise can't recover because of negligence of drivers is completely answered by the many cases in line with the *Miller* case *supra*, and of course *Moran v Washington, Idaho and Montana R. Co.*, 1960 9th Cir. Idaho D.C. 279 F2d 935 decided by this court and now in point with the case at bar. Here the 9th Circuit Court reversed the District Court's judgment for defendant notwithstanding verdict for the plaintiffs, who were parents of a high school boy who had been killed when the pickup truck in which he was a passenger struck the side of the train engine at a crossing. The holding was that question of contributory negligence was for the jury, and that negligence, if any, of the driver of the truck could not be imputed to the deceased passenger. There was evidence that the required warnings for the crossing had not been given by the train by sounding of the whistle and bell which presented a jury question as to negligence of the defendant railroad. There was evidence of view obstruction on approach of the train from the driver's left on emergence from a cut at a country crossing near Bovill, Idaho with no automatic lighted or moving warning signals at the crossing. There were three boys in the pickup seat with decedent on the right side and the two boys who survived that accident testified that decedent had



called a warning to the driver that "there's the train." Both the survivors testified that they heard no warning horn or whistle of the train, but the train personnel testified that whistle was blown at intervals up until the train started to use its brakes. Both the driver of the truck and the decedent had traveled over the crossing on many occasions before. The train speed was 24 miles per hour. The 9th Circuit here held:

"It is conceded by appellee that upon a motion for a directed verdict appellants were entitled to have the evidence viewed in a light most advantageous to them. With this rule in mind, we turn to the question of whether or not there was evidence of the railroad's negligence which would be sufficient to be considered by the jury.

Concerning the question of whether the whistle was blown or not, we have on one side the negative testimony of the truck driver and his passenger that they did not hear the whistle, and on the other side the positive testimony of the trainmen that the whistle was blown. This question was considered recently by the Supreme Court of Idaho in *Ralph v Union Pac. R. Co.* 351 P2d 464, 467. The Court said:

"In considering the question whether respondents sounded a bell or whistle in approaching the crossing, we are quite aware of the negative aspect of the testimony of appellants' witness, the bus driver, and of the positive testimony of respondents' witness,



the railroad's fireman \* \* \*. Negative evidence is entitled to consideration unless it 'is so destitute of probative value that it will not be received.' *Kerby v Oregon Short Line R. Co.*, 45 Idaho 636 264 P. 377 \* \* \*.

"We must assume facts however most favorable to appellants first that respondents failed to sound a bell or whistle in approaching the crossing in the face of respondents' assertion that they did \* \* \*."

"The District Court, in granting the motion notwithstanding the verdict, held that "the sole proximate cause of this accident \* \* \* was the negligence of the driver of the truck in failing to heed the warning of the railroad crossing; to look and listen for approaching trains and, if necessary, to stop." In this case, however, it is and of course must be conceded that the negligence, if any, of the driver of the truck is not to be imputed to the decedent."

"The decedent, of course, was required to exercise ordinary care for his own safety. *Ineas v Union Pac. R. Co.*, 72 Idaho 390 241 P2d 1178, 1179. None of the cases cited by appellee put upon a passenger in an automobile any greater duty than to exercise ordinary care under all the circumstances."

We of course can never know what Catherine Jarrett may have done or said about the train. The law presumes she acted with due care. *Flecnor v Oregon Short Line R. R. Co.*, 1900, 16 Idaho 781 102 Pac. 897, and there is no evi-

dence to the contrary. It must be remembered that the evidence does show that she was a considerate well mannered girl of 14 years, that she was riding in the back seat of a Buick Sedan, (R.T. 318, 323) with Mr. Nelson driving with another man in the front seat with him, it was a winter night, she had done baby sitting for the Nelsons before, he was a truck driver by vocation, (R.T. 281) she would have had no control over the car, her view of the approaching train would have been obstructed by the houses and trees fronting Alpine Street, the utility poles and weeds on the railroad right-of-way to the west of the crossing and the signal structures and the signal control house as shown by the pictures in evidence.

The facts here are certainly not within the confines of *Ineas v Union Pac. R. Co.*, 1952 72 Idaho 390, 241 P2d 1178 as contended by the appellants. A girl of such tender years could not be held a party to Nelson's violation of law in operation of his car by failing to maintain proper control under the existing circumstances. There was no evidence of covering over the view windows of the car, and the evidence did show that the approaching train would not be clearly visible. Catherine would not have been aware of Nelson's violation of any express statutes, nor is there evidence to show that she should have gotten out of the car to avoid the accident. She was a helpless victim of the concurrent negligence of the dangerous train operation at 73 miles per hour with failure to warn of its presence and the wrongful operation of his car by Nelson in failure to maintain safe control, but none of this negligence is imputable to Cather-

ine, 38 Am. Jur. 938 Sec. 247, 127 ALR 1455. 8 Am. Jur. 2d Automobiles Sec. 670, stating the rule as follows:

“Modern authorities have, with few exceptions adopted the rule that the contributory negligence of the driver of a vehicle is not imputable to another occupant of the vehicle who has no control or authority over the driver so as to prevent the former, when injured by the concurrent negligence of the driver and another person, from recovering from the third person. In accord with this rule, it is well established that the contributory negligence of the driver of an automobile cannot be imputed to a guest or passenger riding therein who has no control or authority over the driver or over the operation of the car; a guest having no such control or authority over the driver or the automobile is not precluded from recovering from a third party for injuries received in a collision due to the concurring negligence of such third party and the driver in which the guest does not participate.” 5 Am. Jur. 781 Sec. 494, Accord the *Moran* case.

None of the negligence of Nelson was imputable to Catherine, and there was no evidence of any negligence on her part, and if there had been it was with proper instructions submitted to the jury as an issue in the case and by them determined. As held by the *Moran* case, the rule is:

“Normally, the question of the contributory negligence of a passenger is a question of fact. In *Stowers v Union Pac. R. Co.* 72 Idaho 87, 237 P2d 1041, 1945, the court said:

“The question of the existence of negligence and contributory negligence only becomes a question of law when the evidence is susceptible of no other reasonable interpretation than the conduct of the injured party contributed to his injury and that because of his negligence and carelessness he did not act as a reasonably prudent person would have acted under the circumstances \* \* .

“In determining the question of contributory negligence due care or ordinary prudence under the circumstances is the only test. The presence or absence of contributory negligence must be judged by the conditions, circumstances and surroundings at the time of the accident and whether under such the person acted as a reasonably prudent person would have acted \* \* .

“It is ordinarily a question for the jury whether a person injured exercised due care in looking and listening where his view or his hearing is obstructed by darkness or dust or wind, or by a combination of two or more of these conditins \* \* .”

“It appears to us that under the evidence in this case reasonable minds could differ as to whether or not decedent in this case exercised ordinary care for his own safety, and that the matter should have been left to the determination of the jury. It cannot be said as a matter of law that decedent exercised no care for his own safety or was riding in the truck blindly without

observing conditions about him. Assuming as we must assume, that no warning was sounded by the train, it was shown that the decedent was alert enough to call a warning to the driver as soon as the train emerged into view from the cut. We hold that it cannot be said that the decedent was guilty of contributory negligence as a matter of law.

The judgment of the District Court is reversed with instructions to reinstate the jury verdict."

There is no way to learn when Catherine discovered the presence of the train or what warning she may have called to Mr. Nelson, but it could not be found that she was guilty of contributory negligence as a matter of law, and the jury did not find that she was guilty of contributory negligence as a matter of fact.

To say that no facts exist upon which it can be said that either Fletcher or the railroad were negligent, and certainly none which contributed to the collision, as contended by the appellants, could only be reasoned on the theory that the king can do no wrong. However more moderate train speeds were required through the city to provide some margin of safety to satisfy ordinary standards of prudence so that observations and warnings by the train crew can have semblance of reasonable effectiveness. Unfettered speed license does not satisfy any criteria of due care within fundamental rules of tort law. To ignore all the circumstances except the time table is not prudent.



9.

**There Was No Error in the Trial Prejudicial to  
Appellants and New Trial Is Not Warranted**

There is no reason for a new trial of this case, and there was no error of the trial court not directing verdict for appellants, and he properly submitted the case to the jury which warrants support of the rule of appellants' authority of *McCracken v Richmond, F. & P. Ry. Co.*, 1957 4th Cir. D.C. Vir. 240 F2d 484, which reversed a directed verdict for the railroad and ordered a new trial so the issues could be decided by a jury, holding:

“Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelming so as to leave no room to doubt what the fact is.”

The record shows there was no miscarriage of justice by the jury finding all three defendants negligent resulting in joint tort causing injuries, and holding against appellants was in no sense against the weight of the evidence. The negligence of appellants is not to be absolved by that of Nelson. It would be difficult to imagine a more adequate case of concurrent negligence for jury decision than here proved, and the verdict was most certainly not against the weight of evidence as to all of the defendants.

### **\$60,000 for Loss of Catherine Jarrett to Her Parents Is Not Excessive**

Appellants argue that the verdict is so large that it surely must have been rendered under the influence of passion and prejudice, and is such as to shock one's conscience, but there are no facts in this case that could bring the verdict within this rule, and the trial court could plainly so see in ruling upon defense motion for judgment notwithstanding the verdict or for a new trial. (C.T. 235, 312) The trial judge could see there was no passion or prejudice of the jury and no shock to the conscience in awarding \$60,000.00 for the loss of Catherine's life to her parents. They urge such is especially so as to the railroad and Fletcher because they feel their negligence was less than that of Nelson. However, although there is nothing in the law providing for comparing negligence in degrees among joint tortfeasors for lessening respective liability, in this case it certainly could be found by the jury that the railroad's and Fletcher's faults would far exceed those of Nelson as discussed in detail in our previous paragraphs, particularly the company providing for 60 miles per hour speed at the hazardous Roosevelt crossing with obstructed view, and the engineer approaching it a 73 miles per hour without statutory and adequate effective audible warnings by whistle and bell, in addition to the icy slick conditions of the streets that he should have foreseen would cause trouble to motorists ability to control their cars that night. Although there was no issue that the engine head light was lighted

there was issue as to whether it was, before emergency application, the mars oscillating type that would add distinguishment to a train approaching the crossing rather than an automobile approaching on Alpine Street which could not have been foreseen by a motorist in Nelson's position to be approaching at 73 miles per hour into a city street intersection, comprising part of the existing circumstances for the rules of prudence. Mr. Wood in the best position to know because he was the one facing the engine as it approached the crossing testified that he saw the head light (R.T. 203) as he drove over the crossing ahead of the train, that it was a bright light (R.T. 207) but that he "did not see the light swinging back and forth" (R.T. 208) and at no time did he see the mars light in operation in its white or red function. (R.T. 221) The oscillating light evidence came from the train crew, Fletcher (R.T. 158) and fireman Henderson (R.T. 388) and made conflict in the evidence for jury question. There is no basis for appellants' contention that the jury was attempting to inflict punishment or retribution, or that they went beyond the court's instructions in awarding just damages for plaintiff's loss. (R.T. 444 Inst. 33, 446 Inst. 34, 456 Inst. 35, 451 Inst. 36, 452, Inst. 37) There can be no quarrel with the legal principal urged by appellants that there must be reasonable relationship between the injuries sustained and the damages awarded.

In this modern day under normal relationships between parent and child the old historical concept that a parent could expect to obtain contributions from the earnings of

their child to be considered as an item of damage resulting from their wrongful death, is now a completely unrealistic and outmoded concept. Children do not contribute earnings to their parents in the ordinary practice, and Catherine Jarrett was no exception to this, and hence there was no evidence in the case or any theory for recovery pursued by appellees for rights of recovery for expectant contributions from earnings of their daughter lost because of her wrongful death. Appellants are quite right in their argument that a child and particularly a girl is an expense to her parents. The prospect of obtaining money from a child during minority and afterward is, normally and in this case, too remote to be the basis of proper award of damages, and no evidence was or could be established here or recovery sought for damages on that basis, (C.T. 10) and this is according to the record properly before the jury.

The law of the right to and the damages recoverable from wrongful death cause in Idaho are stated by *Idaho Code 5-311* stating when the death of a person is caused by the wrongful act or neglect of another his heirs may maintain an action for damages against those responsible for the negligence, *and such damages may be given as under all the circumstances of the case may be just*, and this statutory law as interpreted by the courts as illustrated by the line of authority in *Hepp v Adder*, 1942 64 Idaho 240, 130 P2d 859, wherein it is held:

“Although the decisions are agreed that recovery may not be had for grief and anguish suffered by the surviving relatives of the deceased, it may be had, in

Idaho for loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc. (*Wyland v Twin Falls Canal Co.*, 48 Ida. 789, 285 Pac. 676.)”

“It is not necessary, in this state, for a husband or wife, in order to recover for the death of the other, caused by wrongful act or negligence, to plead or prove damages arising from loss of services, food, clothing, shelter or anything else which may be measured in dollars and cents. The same rule applies in cases where a parent sues for the death of a child or the child for the death of a parent. Pecuniary loss, in cases of this kind, will be presumed upon proof of death, caused by the wrongful act or negligence of the defendant, and the relationship of husband and wife, or parent and child, existing between the plaintiff and the deceased. *Anderson v Great Northern Ry. Co.*, 15 Idaho 513, 99 Pac. 91; *Kelly v Lemhi Ins. and Orchard Co., Ltd.*, 30 Ida. 778 168 Pac. 1076; *Wyland v. Twin Falls Canal Co.*, 48 Idaho 789, 285 Pac. 676; *Butler v Townend*, 50 Ida. 542, 298 Pac. 375; *Willi v Schaefer Hitchcock Co.*, 53 Ida. 367, 25 Pac. 2nd 167.”

“Fixing amount of damages to be awarded, in a case involving death by wrongful act or negligence, is the duty and responsibility of the jury.”

This following earlier case of *Anderson v Great Northern Ry. Co.*, 1908, 15 Idaho 513, 99 Pac. 91 which holds:



“The jury \* \* \* may take into consideration the degree of intimacy existing between the father and the child and the loss of companionship if such be shown. The jury is authorized to assess such pecuniary damages ‘as under all the circumstances of the case may be just’ and in such case they are not limited to precise and specific pecuniary amount measured by the direct evidence given in the case, but are at liberty to take into consideration, guided by the evidence given in the case, the intrinsic probabilities that damages have been sustained by and on account of the loss of bodily care or intellectual culture or moral training which the parent of the deceased have previously supplied or bestowed.”

The jury is to decide what the value of the loss of the life is to the heirs as may be just under all circumstances as the rule is stated in *Butler v Townsend* 1931 50 Idaho 542, 298 Pac. 375, as follows:

“In cases of this character it is not possible to prove the damage with any approximation to certainty. The jury must estimate them as best they can by reasonable probabilities, based upon their sound judgment as to what would be just and proper under all of the circumstances.” (citing numerous authorities)

In addition to the legal presumption of pecuniary loss as fixed by the foregoing authorities the appellees’ evidence established the specific losses resulting to both parents by Catherine’s death, by their loss of her society, companionship and comfort as items of compensatory damage within

the law of the *Hepp* case. Examination of the evidence as to what this loss really was shows that Catherine was a splendid person and daughter, (Exhibit 28) and close loving family relationship. (R.T. 276-279, 311-315) The quality of the person whose life has been taken and the characteristics that give the values to the parents who have lost her society, companionship, and comfort as would be seen by the jury from the evidence of Catherine as a living person comprise facts for evaluation by the jury to decide what is just. The evidence is clear that she was an exceptionally good student. (R.T. 189-192, 185-189, 107-110, 193-196, 325-328) Her report cards and the testimony of her teachers showed her academic capabilities and potential, with the teachers supplying impartial evidence about the fine characteristics of her personality, attitudes, intelligence, health, sincerity, dependability, energy diligence in acquiring education and getting along with people. The teacher's written comments on the report cards showing extraordinary results are significant evidence of her good qualities, and their testimony that she was college material are competent evidence of her promising potential. (Exhibits 23, 29, 30, 31, 40) This is evidence the jury could view in determining just values for what had been lost to her parents which actuarially would have continued through the life expectancy of the parents of 22 and 24 years. (R.T. 280, 314)

The evidence of good relationship between Catherine and her mother and father on which there was no issue, was close, warm and loving, that she was cheerful and con-

siderate, that she was a happy part of their lives and of great comfort to them, her singing spirit and her laughter contributed to their mutual society and companionship. Her intelligence and school achievements were source of pride, and that their memories about her had not been forgotten. That what Catherine's parents had missed about her was a daily experience. This will continue. The loss since her death has not diminished. That they shared her accomplishments, and gave them much to be proud of. Plans were considered for her future, she was interested in nursing career even at 14, and her aptitude in science, mathematics, and language were outstanding. This evidence all adds up to Catherine being a wonderful daughter that was lost to her parents, and these were the facts before the jury, when they found the plaintiffs sustained damages of \$60,000.00 by this loss.

Life is the most valuable thing known to mankind, and while the law recognizes that it is not a simple task for a jury to decide what are such damages under all the circumstances of the case may be just, it is still their duty and responsibility under wrongful death case. The issue here on appeal is whether \$60,000.00 is a miscarriage of justice under the evidence and the law of this case? Defendants argue that this is so excessive as to shock the conscience, but more certainly any less would be to shock true conscience under this record.

The evidence of Catherine's qualities was well established by competent and disinterested witnesses. Mrs. Frahm her home room teacher testified "She was a good

student—an “A” student” and she was very neat in appearance—a quiet girl, but she had many friends. \* \* \* She was above average and quite sophisticated for her age in that manner that eighth graders are not very old.” (R.T. 108) Her A grades she earned in English show from the report card Exhibit 23. Mr. Donnelly her general science teacher testified she was “Very very capable girl. She had real good ability and she was very stable, and she was on outstanding student. She was a cut above the average.” (R.T. 186) That her general intelligence was “very high, as through testing, I don’t know, but I know she was an outstanding student and a tremendous quest for knowledge.” (R.T. 187) Mr. Donnelly who also taught physical education said her health was good and “a very radiant person—very pleasant.” (R.T. 188) Her report card Exhibit 29 shows her A grades in science. Mr. Bastian her French II teacher testified Catherine was “a wonderful girl. It was a pleasure to have her in my class.” She was “intelligent and sweet \* \* \* an “A’ honor student.” (R.T. 190) That “she was a near perfect person. A very capable girl,” with unlimited potential. (R.T. 192) Exhibit 30 her French report card shows A’s for all grading periods and the teachers comment *Elle fait tre’s bien* which Mr. Bastian translated for the jury “You are doing very well.” (R.T. 191) Mr. Merrell her American History teacher testified she was a “Very good organizer and extremely conscientious” and she stood out in his memory thusly “this is the first individual I ever had who voluntarily conducted themselves in such an orderly procedure. That doesn’t mean to say there are not many many other wonderful stu-



dents, but she had the particular quality that seemed to be peculiar to her.” (R.T. 194) Mr. Merrell had taught in the Boise School system for 12 years. (R.T. 193) Her history report and Exhibit 31 showed her B grade which Mr. Merrell testified “would have been a B plus instead of a straight B,” and she was college material. (R.T. 195) Mr. Patterson Catherine’s mathematics teacher testified “She was a very fine girl” (R.T. 326) and “She was an excellent student” and that “she would have been good college material.” (R.T. 327) Exhibit 40 her Math 8 report card shows her A grades in that subject. These are the evidences that give the substantial values to Catherine’s life that was lost to her mother and father, and the comfort that would normally flow from such accomplishments, and proper items for jury consideration under the Idaho rules of law and that of the *Hepp* case in particular.

Appellants urge that Catherine would likely marry, as though such would diminish or eliminate the loss of society, companionship and comfort that a parent receives from a good child. It is a matter of common knowledge and understanding that such may more likely enrich family relationship within these legally compensable items of damage and reduce the monetary expense of children. It would be entirely wrong to assume reduction of damage because of marriage of a child. Opportunity for society companionship and comfort is not to be limited to the period that a child might be living with parents as test of damage for wrongful death. The test is a living or deceased child, and the comfort parents have from this fact as concerns the mu-



tual lives and futures through the respective life expectancies, whether married or not. In wrongful death cases there are more important losses than monetary contributions, food, support, shelter, clothing and the like, and this case is fitting example. The value of Catherine's life to her parents is far beyond any petty effort for reconciliation of the nominal items of her support of them, or their support of her.

Appellants argument that if and when Catherine were married cause of action for wrongful death would not lie in her parents, is answered by the fact that the cause of action accrued as of the time of the wrongful death and the rights under the law fix at that time. To speculate about when and if she might marry has no place in determining propriety of the jury award for her wrongful death. The rights to recovery of what may be just under all circumstances of the case determine on the relationship existing at the time the cause of action accrues.

Idaho Code Section 5-310, provides:

"The parents may maintain an action for the injury or death of a minor child, \* \* \* when such injury or death is caused by the wrongful act or negligence of another, \* \* \* such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person."

Idaho Code Section 5-311, provides:

“When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; \* \* \*. In every action under this and the preceding section, (5-310) such damages may be given as under all the circumstances of the case may be just.”

It can clearly be seen from this law that the parents have the cause of action to recover from the wrongdoers for the death of their minor child damages as may under all the circumstances of the case be just. Only when the decedent not a minor is the cause of action in the heirs or personal representatives of the decedent. There is no legal basis for appellants' contention that if after the minor should marry the parents rights to damages would terminate. There could be no legal basis for so instructing a jury accordingly, and of course such was not done in this case, and in short Catherine's prospects of subsequent marriage is entirely irrelevant, and no evidence in this connection is in the record.

*Hayward v Yost*, 1952 72 Idaho 415 242 P2d 971, a later Idaho case following the rules of *Hepp v Ader* supra, in a child injury case holds:

“The amount of damages to be allowed the child for personal injuries and also to his parents is primarily for the jury to determine and this court will not disturb such verdicts except where is clearly appears that the trial court abused its discretion. *Koch v Elkins*, 71 Idaho 50, 225 P. 2d 457. The appellants raised the contention that the verdicts were excessive by their

motions for new trial in each case; the trial court denied such motions for new trial and held that the verdicts were not excessive; such ruling by the trial court is entitled to weight in this court and will not be set aside in the absence of abuse of discretion. *Kock v. Elkins*, *supra*.”

“The facts in this case are not such that any excess appears as a matter of law or the amount is such as to suggest at first blush the presence of passion or prejudice on the part of the jury and we cannot say, after carefully examining the evidence, and under the facts in this case, that either verdict is excessive or that the jury was motivated by passion and prejudice in returning the verdict in either case or that the trial court abused its discretion in refusing to set aside either verdict and grant a new trial. *Garrett v Taylor*, *supra*; *Checketts v. Bowman*, *supra*; *Bates v. Siebrand Bros. Circus & Carnival*, 71 Idaho 318, 231 P.2d 747.”

“The statute, Sec. 5-311, I.C., provides that “such damages may be given as under all the circumstances of the case may be just”; under this statute grief and anguish are not elements entering into the determination of such damages. *Checketts v. Bowman*, *supra*; *Hepp v. Ader*, 64 Idaho 240, 130 P.2d 859; 15 Am. Jur. Sec. 180, p. 597; 39 Am. Jur. Sec. 80, p. 726. It is a presumption that the jury after hearing all testimony and receiving the instructions of the court with reference to the amount of damages, took into consideration all elements of damages set out in the instruc-

tions of the court. *Summerfield v. Pringle*, 65 Idaho 300, 144 P.2d 213.”

The district judge in this Jarrett case correctly instructed that no award could be made for grief and anguish, (R.T. 447, Inst. 34) and there is nothing in the record to show the jury failed to follow this instruction and the presumption is that the jury did not include in their verdict any amount for grief and anguish. The defense point that the case must be directed toward recovery for grief and anguish, is not true. The record is immaculate that all basis of recovery was based upon loss of Catherine's life to her parents, and no award was to be made for grief or anguish. The court instructed the jury specifically on this, “Grief and anguish, however, are not to be considered by you as element of damages.” (Inst. 34, R.T. 447) He did properly instruct “you may also consider such comfort, society and companionship she would have afforded to her parents had she lived.” (Ins. 34, R.T. 447) It cannot be found from the record in this case that the jury did not follow the court's instructions, and they could certainly be completely objective on the evidence and find the value of the loss, without any grief or anguish, far in excess of the \$60,000.00 awarded. The value of the loss of the life of Catherine to her parents was the province of the jury, and the trial contained no error to prevent them from properly deciding that question before them.

The case was prosecuted on the theory that the compensable damage was the lifetime loss to the parents of the so-



ciety, companionship and comfort of Catherine, within the rules of the *Hepp* and *Hayward* cases.

The \$60,000.00 award was based upon the most competent of evidence, the value of the life of a quality girl to her parents. From the reported record in the case of *Checketts v Bowman* 1950, 70 Idaho 463 220 P2d 682 there is little to make any comparison of the two cases on the amount of award. It is not really accurate to evaluate child death cases simply by the age and sex of the child and the amount of award, and particularly for comparison as argued by defense that the death of an 8-year old boy is from a damage standpoint worth more than a 14 year old girl. Nothing could be farther from the truth, and each wrongful death case must rest upon its own facts. The particular human element becomes involved, and the value of such human life is not to be lightly regarded. While it may be easier to fix values on machines and livestock that would exceed \$60,000.00 is it to be held (as contended by appellants) that the jury here went far beyond any reasonable, logical or rational award to find \$60,000.00 for the loss of Catherine Jarrett? While she would be giving her parents something more valuable than money, the law provides that the jury has the duty of transposing that into money as best they can under the circumstances as may be just. Any failure of the jury here was in not awarding more for the loss to the appellees.

Although wrongful death case awards can not properly be cited as precedent authority as to amount, as evidence is normally too varied, we can cite some cases which show



more reasonable values for child loss cases, recognizing that there are others below. Juries have varied widely and the stare decisis does not provide best example.

In *Royal Crown Bottling Company v Bell*, 1959 Ga. 111 SE2d 734, it was held on appeal that \$54,000.00 to mother for death of 17 years old married daughter was not excessive as to show bias or prejudice on the part of the jury, and denial of defense motion for judgment notwithstanding the verdict or for new trial was affirmed.

*Blisard v Vargo*, 1961 6th Cir. Mich D.C. 286 F2d 169, held \$50,000.00 verdict for wrongful death of 8½ year old boy who was both bright and steady did not entitle defendant to new trial on ground of excessiveness, and the Circuit Court held:

“Our authority in such a case is a very limited one. We find no abuse of discretion by the trial judge. The judgment will be affirmed.”

*Mann v Bowman Transportation, Inc.*, 1962 4th Cir. So. Car. D.C. 300 F2d 505, affirmed a judgment on verdict for \$55,000.00 to parents for death of 20 year old son against the defense contention that it was excessive as to the \$27,500.00 for the father because divorced from the boys mother, where they said the father still suffered loss;

“ \* \* \* or that he would not lose future companionship as a result of his son’s untimely death? These questions were for the jury to determine, and there has been no contention, nor is there anything to indicate, that the verdict of the jury was the result of mistake, caprice,

passion, prejudice or was otherwise improperly motivated.”

In *Sandifer Oil Co., Inc. v Dew* 1954, Miss. 71 So 2d 752, a \$90,000.00 verdict was affirmed against the contention it was excessive for the death of a 14 year old girl who was a good daughter and sister. On appeal from denied motion for a new trial the court said:

“It was the province of the jury, and the jury alone, to measure in dollars and cents the amount due him for physical and mental anguish and suffering, and, unless in a case where the verdict plainly shows that the jury must have been influenced by passion, prejudice, or corruption, this court never interferes with their finding as to damages. \* \* \* This court has no scale delicate enough to weigh physical and mental anguish. At best it is an extremely difficult task. The law has committed this delicate task to the unbiased judgment of the 12 plain, practical, every day men who compose the jury, and it can nowhere be more safely rested than in the application of their good sense and honest judgment to the particular facts proven in each particular case.”

*Mock v Atlantic Coast Line R. Co.*, 1955 S.C. 87 SE2d 830 held it was not an abuse of discretion for trial court's refusal to grant a new trial for excessive verdict which awarded \$50,000.00 compensatory and \$15,000.00 punitive damages to father of 12 year old son who was killed in a train car accident when his mother drove the car into path of oncoming train. Here the court held:

“\* \* \* The unquestioned power of this court thus to strike down the judgment of the lower court has been and should continue to be exercised only in those rare instances in which the amount of the verdict is so shockingly excessive as manifestly to show that the jury was actuated by passion, partiality, prejudice or corruption.”

In *McKirdy v Cascio* 1955 Conn. 11 A2d 555 an award of \$50,000.00 for the wrongful death of an 18 year old boy who had just completed high school and planned to go to college, was held not excessive, and said:

“The only practical test to apply to this verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption. (citing cases) The verdict in this case meets this test. \* \* \* There is no error.”

Making book on the many decisions under verdicts for amounts of damages really can accomplish no practical precedent for award in any particular case. Value of human life is not something that can be so categorized. What appears in the instant case before the court is the important consideration. The test is whether the jury's finding of just award is in fact a manifest miscarriage of justice. It is earnestly submitted that such is not the fact in this Jarrett case. The jury verdicts effectively protect the defendants in the many lower value cases and only rarely have remit-

turs been warranted. 14 ALR 2d 550, Annotation on excessiveness and inadequacy of damages for personal injury resulting in death of infants, and ALR 2d Supplemental Service 1965 page 152. Higher values than the older cases reflect is called for in the modern time, and surely the verdict finding the life of Catherine to be worth \$60,000.00 could not fairly shock the conscience as being excessive under the record. When the facts justify no one needs fear proper first impression precedent. Many human death cases are measured in hundreds of thousands of dollars and sustained by our highest courts.

The appellants whole position on damages is succinctly summarized by their announcement that the judgment is "just too high." But reversal would require evidence of why, and the record doesn't satisfy their contention. The principal thrust of the defense is that the life of a minor child just can't be worth \$60,000.00 to the parents. This argument can't be met founded as it is in mystery and abstract depreciation for the values of human life. Undoubtedly our jury system is the best way to obtain the best answers possible to admittedly difficult questions when evaluating loss of human life. To set out all of the rational reasons from the record why the jury found the way they did after their participation in the trial would be impossible, but to impeach their verdict for the reason that it was just too high would to violence to the fundamental rights of trial by jury.

Appellants argue that there has never been so large an award in Idaho for death of a minor child, but why should



human life be worth less in Idaho? Perhaps there has not heretofore been such comparable circumstances under which the jury was to decide what was just. Most assuredly the evidence of Catherine and her fine qualities shows the loss was ample and substantial, and there is no evidence to show the jury didn't exercise their best judgment. The record is clear that there was no passion or prejudice. The record was orderly made and only the cold plain facts of what happened and its results were before the jury, and there is no basis for urging that their verdict was given under influence of passion and prejudice, nor is there any justification for appellants to assume that the jury was attempting to inflict punishment or retribution on any defendant. It would be most difficult to see how the jury could have found that the value of Catherine's life could be worth any less to her parents than the verdict of \$60,000.00

Before a new trial is to be granted upon the grounds of excessive damages appearing to have been given under the influence of passion and prejudice, such fact must be made clearly to appear to the court. *Short v Boise Valley Tractor Co.*, 1924 38 Idaho 593 225 Pac. 398. *Ellis v Ashton and St. Anthony Power Co.*, 1925 41 Idaho 106 238 Pac. 517, followed by *Osier v Consumers Co.*, 1926 42 Idaho, 789 248 Pac. 438, where it was held:

"We now take occasion to say that verdicts will not be interfered with by this court on account of being excessive unless the facts are such that the excess can be determined as a matter of law or that the verdict is so excessive as to be shocking to one's conscience and



to clearly indicate passion, prejudice or corruption on the part of the jury.

Verdicts rendered 10, 15 or 20 years ago are of little help in determining what amount is now excessive in a personal injury case. The present cost of living must be considered and the diminished purchasing power of the dollar must be taken into consideration when estimating damages."

And in *Nelson v Johnson* 1925 41 Idaho 697 243 Pac. 647 the court in holding it must be made to clearly appear that a verdict was given under the influence of passion or prejudice before it may be set aside as excessive, said:

"There is no evidence or intimation in the record that the jury was actuated by any bias or prejudice in awarding this sum or that the instructions given were not in keeping with the evidence adduced. In such a case the presumption arises that the jury took into consideration all the elements of damage set out in the instructions and that the damages given were not excessive or given by reason of any passion or prejudice and we see no reason to disturb the verdict."

Accord *Reinhold v Spencer* 1933 53 Idaho 688 26 P2d 796.

The cases of *Checketts v Bowman*, 1960 70 Idaho 463, 220 P2d 682, and *Covey Gas & Oil Co. v Checketts*, 1961 9th Cir. D.C. Idaho 187 F2d 561, relied upon by appellants for authority for remittitur have important distinctions to the case at bar. In the *Bowman* case the trial judge, who

had of course viewed the whole trial process, in exercise of his discretion had granted remittitur of \$20,000.00 on the \$40,000.00 verdict finding that the verdict was excessive, and as alternative to acceptance granted defense motion for new trial. The appellate court finding that the trial court had not abused his discretion affirmed the remittitur. Then the parents of the deceased child who were the plaintiffs in the wrongful death action in the trial court dismissed the suit, and filed a new action in the United States District Court for Idaho against Covey Gas & Oil Co., the owner of the truck that was being driven by Bowman when it struck and killed their 8 year old son. A \$35,000.00 verdict resulted from the trial in the Federal District Court, but on appeal to this 9th Circuit Court it was held "This is a clear case of what is aptly called "forum shopping," and granted remittitur reducing the judgment again to \$20,000.00 as originally found by the state district court trial judge. No such comparable circumstances occurred in the case at bar, and the *Checketts* cases are not thus precedent for remittitur here as contended by appellants.

It is not questioned but what this court has power to review amount of judgment based upon jury verdicts, *Southern Pac. Co. v Guthrie*, 1951 9th Cir. N.D. Cal., 186 F2d 926, and defense authority of *Dagnello v Long Island R. R. Co.*, 1961 2nd Cir. SD NY 289 F2d 797, but *Union Pacific R. R. Co., v Johnson*, 1957 9th Cir. D Idaho 249 F2d 674 appears to announce the rule that the trial court has important discretionary powers in matters of new trial on contention of excessive verdict which requires real show-

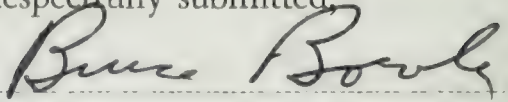
ing of abuse to change. Accord *Steinbock v Schiewe*, 1964 9th Cir. D Oregon 330 F2d 510; and *MacDonald Engineering Co. v Hoover*, 1961 SD Iowa 8th Cir. 290 F2d 301. While remittitur may not be uncommon at the trial court level, the authorities indicate that appellate courts, rarely need to use it, and then only where there is substantial evidence in the record to support miscarriage of justice because of failure of the trial judge. No such failure by Judge Taylor in this case can be found.

The thrust of appellants' position that children just are not worth much, and that their society, companionship and comfort are not real compensable things, and if a jury should make a substantial award it necessarily must have been the result of passion and prejudice is not sound. There was no defense evidence that Catherine's life was worth less to her parents than the \$150,000.00 relief sought. Parents regard the value of their own lives less than that of their children, this is a universal rule of humanity. Life and health are our most valuable assets. The picture of Catherine properly in evidence Exhibit 28 is proof beyond thousands of words of the fine qualities, and characteristics of the decedent lost to the appellees. These were facts properly before the jury for their finding of value under the law to award what was just.

These are the reasons why the judgment should be affirmed.

DATED: February 1, 1967.

Respectfully submitted,



BRUCE BOWLER

*Attorney for Appellees*

244 Sonna Building

Boise, Idaho 83702

Service of the foregoing Brief made by mailing three copies thereof to E. C. Phoenix, Box 530, Pocatello, Idaho, Attorney for Appellants on February 6, 1967.



Attorney for Appellees

### CERTIFICATE

I Certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.



Attorney for Appellees

## APPENDIX, TEXT OF OPINION

*Miller v. Union Pacific R. Co.*, 1933 2 90 US 227, 78  
Led. 285.

“Whether a passenger or a guest in a public or private conveyance, having no control over its movement, may be denied a right of recovery for personal injury or death on the ground of contributory negligence, depends upon his own failure to exercise a proper degree of care, and not upon that of the driver. This is true whether the passenger is the wife of the driver as in other cases. (citing cases) And while the state decisions are not uniform on the subject, the Federal rule is definitely settled that the burden of proving such contributory negligence rests, in all cases, upon the defendant.” (citing cases)

“In the present case, as already appears, the burden was sustained as to the husband. It was not sustained as to the wife. As to her, there is an entire absence of evidence on the point. Whatever duty rested upon her under the circumstances, for aught that appears to the contrary, may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train, or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the crossing. Want of due care for her own safety must be proved; it cannot be presumed. The presumption is the other way. (citing authorities) If, as here there be no evidence which speaks one way or the



b.

other with respect to contributory negligence of the person killed, it is presumed that there was no such negligence. *Looney v Metropolitan R. Co.* 200 U.S. 480, 50 Led 564.”

“Here the wife was not in control of the movement of the automobile. She could only note the danger, warn her husband, and urge him to stop. She may have done so, and he, misjudging the situation or taking the chance, have gone forward nevertheless. Or she may have seen the approaching train, observed that her husband was also aware of the fact and, relying upon her knowledge of his habits and character, trusted him, with good reason until it became too late to interfere, to do whatever was necessary to avoid the danger. The applicable rule is found in *Southern P. Co., v Wright* (C.C.A. 9th) 248 Fed. 261, 264. That was a case where one Wright was riding in a motor truck with an experienced chauffeur as driver. A collision occurred between the truck and a train, which resulted in Wright’s death. It did not appear whether Wright saw the train before it was seen by the chauffeur. The court said that he might have seen it and yet reasonably remained silent on the assumption that, the view being unobstructed, the chauffeur also saw it and was governing himself accordingly. “So that up to the very time that the truck approached the main track he (Wright) may have reasonably supposed that Tucker( the chauffeur) would stop the car in time to avoid a collision. And when he realized that he was

going to attempt to cross ahead of the train, what could, or should he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here, with the truck a half a second sooner or the train a half a second later, the tragedy would have not happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only 30 miles an hour—the speed was probably greater—it was only about 30 seconds from the time it came into view a quarter of a mile away until it crashed into the truck.”

Accordingly, it was held that the question of Wright’s contributory negligence was not one of law but one of fact for the jury.

To the same effect, see *Chicago & E. I. R. Co. v Divine* (C. C. A. 7th) 39 F. (2d) 537, 539; *Thenholm v Southern P. Co.* (C. A. A. 9th) 8 F. (2d) 452; *Baker v Lehigh Valley R. Co.*, 248 N.Y. 131, 135, 136, 161 N.E. 445; *Nelson v Nygren*, 259 N.Y. 71, 75, 181 N.E. 52; *Crough v New York C. R. Co.* 260 N.Y. 227, 232, 183 N.E. 372. In the *Baker Case*, 248 N.Y. 131, 161 N.E. 445 *supra*, the New York Court, holding that the question of the contributory negligence of an automobile passenger killed in a train collision was for the jury and not the court, said:

“Believing the car was about to stop, he may have thought that warning would be needless, and discov-

d.

ering too late that the car was going on, he may have thought that interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

Bradley v Missouri P. R. Co. (C. C. A. 8th) 288 Fed. 484, is cited by respondent to the contrary; but to the extent that it conflicts with the view we have expressed, that case is disapproved.

But the argument is advanced that even though the railroad company be guilty of negligence and the wife be absolved from the charge of contributory negligence, nevertheless the railroad company is not liable, because, under the circumstances here disclosed, the proximate cause of the wife's death was not its negligence, but the negligence of the husband in driving upon the track in the face of the approaching train. The validity of this contention depends altogether upon whether the negligence of the husband constituted an intervening cause which had the effect of turning aside the course of events set in motion by the company, and in and of itself producing the actionable result. The evidence here does not present that situation. Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, co-operating to produce the result. As this court pointed out in *Washington & G. R. Co. v Hickey*, 166 U.S. 521, 525, 41 L.ed. 1101, 1102, 17 S. Ct. 661, the vice of the argument consists in the at-

tempt to separate into two distinct causes (remote and proximate) what in reality is but one continuous cause—that is to say, an attempt to separate two inseparable negligent acts which, uniting to produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile.

The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction.

The rule is settled by innumerable authorities that of injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused

f.

by his negligence alone. "It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury."

\* \* \* The court below erred in holding as matter of law that the wife was guilty of contributory negligence and, therefore, its judgment cannot stand.

Judgment reversed and cause remanded to the district court for further proceedings in conformity with this opinion."



## Appendix, Text of Statutes

### *Section 5-310 Idaho Code.*

Action for injury to child.—The parents may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

### *Section 5-311 Idaho Code.*

Action for wrongful death.—When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

### *Section 49-1102 Idaho Code.*

Persons under the influence of intoxicating liquor or of drugs.—(a) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under

h.

the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.

(b) In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

1. If there was at that time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

2. If there was at that time in excess of 0.05 percent but less than 0.15 percent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

3. If there was at the time 0.15 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

4. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor.

*Section 62-412 Idaho Code.*

Bell or whistle to be sounded.—A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway; or an adequate steam, air, electric or other similar whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of \$100.00 for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the prosecuting attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains or cars, when the provisions of this section are not complied with

# APPENDIX OF EXHIBITS

Exhibits	Description	Identified		Offered		Received or Rejected	
		R. T.	23	R. T.	24	R. T.	26
1 Pl's	Aerial Photograph	"	27	"	30	"	68
2 Def. #	Photograph	"	21	"	30	"	68
3 Def. #	Photograph (Rejected)	"	21	"	30	"	68
4 Def. #	Photograph	"	21	"	30	"	68
5 Def. #	Photograph	"	21	"	30	"	123
6 Def. #	Photograph	"	21	"	30	"	68
7 Def. #	Photograph	"	21	"	30	"	68
8 Def. #	Photograph	"	21	"	30	"	68
9 Def. #	Photograph (Rejected)	"	21	"	30	"	68
10 Def. #	Photograph	"	21	"	30	"	68
11 Def. #	Photograph (Rejected)	"	21	"	30	"	68
12 Def. #	Photograph	"	21	"	30	"	68
13 Def. #	Photograph (Rejected)	"	21	"	30	"	68
14 Def. #	Photograph	"	21	"	30	"	68
15 Def. #	Photograph	"	21	"	30	"	34
16 Def. #	Photograph	"	21	"	30	"	34
17 Def. #	Photograph	"	21	"	30	"	34
18 Def. #	Photograph	"	21	"	30	"	34
19 Def. #	Photograph	"	21	"	30	"	34
20 Def. #	Photograph	"	21	"	30	"	34
21 Def. #	Panoramic photograph	"	48	"	50	"	100
22 Def. #	Panoramic photograph	"	51	"	51	"	99

Pl's	#	23	Report Card	"	109	"	109	"	109
Pl's	#	24	Rules Book UPRR (Rejected)	"	133	"	134	"	134
Pl's	#	25	Time Table, UPRR	"	135	"	135	"	135
Pl's	#	26	Speed tape (Rejected)	"	144	"	145	"	146
Pl's	#	27	Speed tape	"	178	"	178	"	178
Pl's	#	28	Picture of Miss Jarrett	"	186	"	187	"	187
Pl's	#	29	Report Card	"	187	"	188	"	188
Pl's	#	30	Report Card	"	191	"	191	"	191
Pl's	#	31	Report Card	"	195	"	195	"	196
Def.	#	32	Statement of Wood	"	213	"	213	"	215
Def.	#	33	Lab report, blood test	"	238	"	239	"	302
Pl's	#	34	Traffic count, Roosevelt Street (Rejected)	"	253	"	254	"	254
Pl's	#	35	Traffic count, Roosevelt Street (Rejected)	"	255	"	256	"	256
Pl's	#	36	Photograph	"	261	"	262	"	262
Pl's	#	37	Photograph	"	261	"	262	"	262
Pl's	#	38	Photograph	"	261	"	262	"	262
Pl's	#	39	Photograph	"	261	"	262	"	262
Pl's	#	40	Report Card	"	326	"	327	"	327
Def.	#	41	Engineering drawing of crossing	"	335	"	336	"	336
Def.	#	42	Photographs composing Exhibit 21	"	347	"	348	"	349
Def.	#	43	Panoramic photograph	"	351	"	354	"	356

k.





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

UNION PACIFIC RAILROAD COMPANY, a corporation,  
and MARK FLETCHER,

Appellants,

vs.

JOHN W. JARRETT and JUANITA F. JARRETT,

Appellees.

---

REPLY BRIEF OF APPELLANTS

---

Appeal from the United States District Court  
District of Idaho, Southern Division

---

Bryan P. Leverich,  
Salt Lake City, Utah  
E. C. Phoenix  
D. A. Bybee  
F. L. Ringe  
Pocatello, Idaho

Attorneys for Appellants.

**FILED**

MAR 1 1967

MAR 6 1967

WM. B. LUCK, CLERK

---



## SUBJECT INDEX

	Page
Argument	
1. Train Speed Immaterial .....	2
2. Slick Street Possible Proximate Cause .....	4
3. Appellees are Bound by Pleadings and Evidence .....	6
4. Crossing Not Extra-Ordinarily Hazardous .....	10
5. Negative Whistle Evidence Does Not Raise Issue .....	12
6. Superseding Independent Negligence of Nelson .....	13
7. Controlling Fact in Case is the Stop Sign .....	18
8. Damages are Excessive .....	19

# TABLE OF AUTHORITIES CITED

## Cases

	Pages
Blisard vs. Vargo, 6th Cir., 286 F.2nd 169 .....	21
Checketts vs. Bowman, 70 Idaho 463, 220 P. 2nd 682 .....	20
Covey Gas & Oil Co. vs. Checketts, 9th Cir. 187 F. 2nd 561 .....	20
Domingo vs. Phillips, 87 Idaho 55, 390 P. 2nd 297 .....	14
Hart vs. Wabash R. Co., 7th Cir., 177 F. 2nd 492 .....	5
Hepp vs. Ader, 64 Idaho 240, 130 P.2nd 859 .....	20
Hickert vs. Wright (Kansas), 319 P.2nd 152 .....	15
Ineas vs. Union Pac. R. Co., 72 Idaho 390, 241 P.2nd 1178 .....	10
L. & N. RR Co. vs. Fisher, (Ky.), 357 S.W. 2d 683 .....	18
Levendosky vs. Chicago, Milw. St.P. & P.R.Co., 8th Cir., 223 F. 2nd 395 .....	6
Mann vs. Bowman Transportation Inc., 4th Cir. 300 F. 2nd 505 .....	21
Miller vs. Union Pac. R. Co., 290 U. S. 227, 54 S.Ct. 172, 78 L.ed 285 .....	14
Mock vs. Atlantic Coast Line R. Co., 87 S.E. 2nd 830.....	22
Mundy vs. Johnson, 84 Idaho 438, 373 P.2nd 755 .....	14
Olin vs. Honstead, 60 Idaho 211, 91 P.2nd 380 .....	15
Ralph vs. Union Pac. R. Co., 82 Idaho 240, 351 P. 2nd 464 .....	12
Ranstrom vs. Oregon Short Line R. Co., D.C. Idaho, 18 F. Supp. 256 .....	14
Richards vs. Chicago, Rock Island & Pac. R. Co. (Kansas), 139 P. 2nd 427 .....	3
Royal Crown vs. Bell, 111 S.E. 2nd 734 .....	21
Sandifer Oil Co., Inc. vs. Dew, 71 So. 2nd 752 .....	22
Shelite vs. Chicago, Rock Island & P.R. Co., 10th Cir., 307 F.2nd 49 .....	13
Shepard vs. Thompson, 153 Kansas 68, 109 P. 2nd 126 .....	17
Valles vs. Union Pac. R. Co., 72 Idaho 231, 238 P. 2nd 1154 .....	14
Wright vs. Lincoln City Lines, (Nebr.) 71 N.W. 2nd 182 .....	7



<u>Cases</u>	Pages
Yearout vs. Chicago, Milw., St. Paul & P. R. Co., 82 Idaho 466, 354 P. 2nd 759 .....	18

<u>Texts</u>	
52 American Jurisprudence, Sec. 112, p. 453 .....	14
65 Corpus Juris Secundum, Sec. 111, pp. 699-700 .....	17
14 American Law Reports 2nd 550 .....	22



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, )  
and MARK FLETCHER,

Appellants, )

vs. )

JOHN W. JARRETT and JUANITA F. JARRETT, )

Appellees. )

---

APPELLANTS' REPLY BRIEF

Argument

No additional comments are necessary about the Statement of the Pleadings and Jurisdictional Facts, the Statement of the Case or Questions Presented or Specification of Errors which are contained in the opening brief of Appellants.

Some comments about certain representations of fact contained in the brief of Appellees should be made, and they will be made during the discussions of that brief. It might be observed here, however, that the often-repeated allegation that the speed of the train was 73 miles an hour at the time of the collision is incorrect. Reference to the portion of the speed tape in evidence, Exhibit 27, will reveal that at the time the mechanism was broken the speed was approximately 67 miles an hour, a speed reduction already having commenced. Also, the tape shows a speed reduction to approximately 70 mph some distance prior to the collision and that thereafter there was some slight fluxuation in speed but prior to the accident speed already had begun to reduce and had gone

below 70 miles an hour when the accident occurred, at which time the emergency brakes were applied. Such speed over crossings which have either flasher lights or stop signs in a residential area where the right of way of the Railroad Company, as revealed by the photographs in evidence, is substantially unobstructed and is over 50 feet wide, certainly cannot in this day and age be said to be negligent and excessive speed.

### Train Speed Immaterial

Counsel for appellees starts off his brief stating there is no contention being made that trains must be prepared to stop at all times, then he continues for page after page to belabor the appellants for not causing the train to operate slower through Boise and over this crossing. What, then, would be the purpose in going slower? If the streets are slick, would running the train slower make any difference in the way a vehicle is operated? This points up the contention of appellants that speed of the train has nothing to do with this accident. The vehicle made no effort to stop, it did not stop, it was driven without stopping through a stop sign, the very traffic control device which was intended to prevent just such an accident at this location, and the speed of the train had nothing to do with the accident.

Appellees have never pointed out to the court how the speed of the train had any connection with the accident and how going slower would have kept Nelson from running the stop sign. For speed to be of any consequence, it must have been the proximate cause of the accident, yet all appellees have been able to come up with is that with high traffic conditions (as to which there is no evidence), accidents might be expected to occur. The question of speed where the same has no connection with



the accident was considered in the case of Richards v. Chicago, R. I. & Pac. Ry. Co., (Kans.) 139 P. 2nd 427, a wrongful death action over a young girl was a passenger in a car struck at a crossing where, until the right of way was reached there were obstructions to view. One ground of asserted negligence was the speed of the train in violation of a city ordinance. The court said:

"It is difficult to see how the speed of the train, considered by itself, could have any direct bearing upon the collision here involved. Certainly the speed of the car in which the young people were riding and the speed of the train would have to be considered in their relation to each other. If either one of them, and one only, had been going much faster or much slower than it was the collision would not have occurred. So, the train might have been moving 60 or 70 miles per hour, violating the ordinance to a greater extent than it was, and been entirely past the intersection before the car reached it. . . . So, the speed of the train in excess of the ordinance is not sufficient to establish liability. In Vance v. Union Pac. Rd. Co., 133 Kan. 11, 298 P.764, it was held: 'To entitle one to damage caused by a railroad train running through a city at a higher speed than is prescribed by a city ordinance, he must show that the violation was the proximate cause of the injury and loss'." P. 430.

The court held the proximate cause of the accident to be the negligence of the driver and his passengers.

If there were an obstructed view at the crossing so that a motorist could not use the crossing safely if a train was being operated at a high speed, that would be a different story. Here, though, view is open and unobstructed, substantially, for the last 100 feet and if a motorist stops for the stop sign as he is required to do by Idaho law, then a train within his zone of danger is fully visible and can easily be seen, whether it is operated at 60 or 70 or more miles an hour. As a matter of fact, in this case when Nelson drove through the stop sign, the train was only around 600 feet away and there is no evidence which would



even hint that a moving train 600 feet away would not be fully visible to any motorist who stopped his vehicle around the stop sign. Appellant's Exhibit No. 22, taken about 125 feet south of the tracks, picturing the view a motorist would have if he stopped before reaching the traffic sign, shows that the train would be plainly visible. The crossing print, Exhibit No. 41, extends only a little more than 450 feet to the west, but the last telephone pole shown on it is the same pole pictured in Exhibit No. 22 with a wire running from it to the signal house on the right of way, just to the right of the third tree from the right and it is 390 feet west of the crossing. A train moving toward the crossing and passing behind these trees would be plainly visible even from 125 feet south. This being true, how could a slower moving train be of significance in preventing accidents at this location?

#### Slick Street Possible Proximate Cause

What possible influence could the slick streets have on the question of negligence on the part of appellants? The only effect such slick streets could have would be on the ability of a driver to stop, and if because of ice he could not stop whereas without the ice he could have, and this is the only relevancy which ice and snow have in this case, then it is the ice which is the cause of the accident and nothing else. Assume for a moment the unsupported contention of appellees actually has a factual basis - that Nelson tried to stop for the train and couldn't because his wheels were spinning and he couldn't move off the crossing.

"Neither the speed of the train, the lack of signals or of a crossing watchman, or the failure to sound a whistle caused this collision, since the driver of the automobile saw the approaching train and did that which under ordinary driving conditions would have stopped the car. An intervening cause, the slippery pavement, caused the automobile to continue in its forward movement, and that slippery

condition of the pavement was the sole proximate cause of the accident and of the death of Dona Lee Hart."

Hart v. Wabash R. Co., 7th Cir., 1949, 177 F.2d 492, 494.

As the Hart case says earlier, "... the icy condition of the pavement was the sole proximate cause of the collision, and the plaintiff cannot recover even though there may have been negligence on the part of the defendant. (citing cases)." P. 494. The Hart case was for the wrongful death of a 17 year old girl riding in the back seat of an automobile where there was a clear view of the tracks 97 feet from the tracks, where the street was icy and slick and the train was moving in excess of 60 miles an hour through a town in Indiana. Judgment in favor of plaintiffs was reversed. The only factual points where the Hart case is not on all fours with our case is that it occurred in the daytime and the driver was not drunk. In our case, there is no evidence Nelson tried to stop for the train. But what the court has said relative to sliding on the ice will apply with equal effect to Nelson driving through the stop sign. If Nelson could not stop, or start, his vehicle because of the ice and snow, then the proximate cause of the accident would be his inability to drive properly under that circumstance. Certainly the operator of the train could not know what the condition of Roosevelt Street was until he reached it. Slick streets do not impose additional duties upon the operators of trains, as the cases cited in appellants' opening brief, Point 5, page 11, establish, but upon drivers.

As stated in a case where a driver could not stop his vehicle due to the slick conditions of the street, the 8th Circuit Court has said:

"Manifestly, the reason why he was unable to stop his tractor-trailer before colliding with the locomotive in the instant case was because the highway was not in a normal condition. It was covered with ice, and it

was this situation that was the proximate cause of the accident. (citing cases) Defendant was not responsible for the icy condition of the highway ...

Levendosky v. Chicago, Milw. St. Paul & Pac. Ry. Co.,  
8th Cir., 223 F. 2nd 395, 402.

Appellees are Bound by Pleadings and Evidence

Scattered throughout the brief are indications that appellees are trying to tell this Court it is possible Nelson tried to stop or actually did stop, and that anyway, there is no stop sign for the railroad crossing. They have overlooked the allegations of their complaint. Appellees set out several acts of negligence charged against Nelson, and appellants admitted all of these. Therefore, there is no remaining issue in this case as to those facts, appellants having admitted them. Included from Paragraph VI (first) (C.T. 9) are:

"o. In Nelson failing to observe and heed the stop sign and remain stopped for the train at the crossing."

\* \* \* \* \*

"s. In Nelson failing to observe the law relative to the speed and stopping, of his car at the crossing marked by a highway stop sign in his path of travel."

Admitted and now established are the following allegations of the complaint: That Nelson was operating his vehicle under the influence of intoxicating liquors; failed to stop to avoid the collision; drove at an excessive and unlawful speed at the crossing; failed to slow down and stop to avoid the collision; failed to keep his car under control on the slick streets; failed to heed the stop sign and stop for the train; failed to look for the train and to slow and stop to avoid the collision; failed to see and heed the presence of the train; failed to keep his vehicle under control; failed to stop for the stop sign at the railroad crossing; and failed to discharge his duty of care toward Miss Jarrett. These



things having been established as between appellees and appellants, appellees may not now question them. Wright v. Lincoln City Lines, Nebr. 71 N.W. 2d 182, 184, 185.

Despite these established facts, appellees now try to say there is no proof Nelson did not stop (page 14 of their brief); that there is no stop sign for the railroad tracks at this location (pages 15 and 37 of their brief); that Nelson was in his fatal predicament due to negligence on the part of the railroad instead of because of his failure to stop, to look and see and to remain stopped until safe to proceed, as Idaho law requires and as they alleged in their complaint (pages 37 and 38 of their brief); they try to say Nelson could not see the train because of obstructions to view, or in other words that he was not negligent in failing to see the train and stop or not negligent in looking effectively (pages 13 to 15 of their brief). Appellees cannot have the facts both ways - they sued Nelson and obtained a judgment against him, which has become final. Appellees by their pleadings and by keeping Nelson in the case, have established the point appellants are making - that anything appellants did or did not do constituted only conditions, and the sole proximate, intervening cause of the accident was the negligence of Nelson. Appellees did not assert against Nelson that he failed to heed warning signals; they claimed and the proof fully established that the accident occurred because Nelson did not have his car under control. In this circumstance, what difference does it make what appellants did or did not do? Appellees complain that it could not be right to say the railroad has no responsibility for what happened here, yet their own pleading, the proof produced and the law all combine to establish that the proximate cause of the accident was the failure of Nelson to stop

for the stop sign.

Appellees suggest that motorists on Roosevelt who stop at the stop sign would be confused and might mistake automobiles on Alpine Street with approaching trains, but this is gratuitous on their part. There is no evidence that such possible confusion exists and on the other hand, their own witness, Wood, refutes the contention. He had no trouble seeing the train when it was around 1,300 feet away at Garden Street; he had no difficulty observing it was a train and observing its speed enough to determine that he could cross safely, but he stated that if the train had been any closer, he wouldn't have tried it - and Nelson was behind him. Wood was not confused by a train 1,300 feet away, yet when Nelson reached the crossing, the train was only 600 feet away and it could not have been confused with an automobile by anyone, drunk or sober. Had Nelson even paused at the stop sign to look, the train would have been at and over the crossing and the accident would not have occurred. So we come back to the inescapable conclusion that the cause of the accident was the failure of the intoxicated Nelson to stop at and for the stop sign.

Appellees would have this Court believe the railroad right of way between the north edge of Alpine Street and the tracks is "dangerously obstructed" (page 13 of their brief). The signal shack, they say, combined with "the electric wire poles and signal posts and weeds shown by the true perspective exhibits" makes this a dangerous and hazardous crossing. Appellees are the only ones who feel there is any problem. No other witness so testified, and reference to the photographs in evidence, even those taken by appellees' own attorney and which obviously were taken with a telephoto lens so that telephone poles appear to be all



bunched together, demonstrate the absurdity of such a statement. For the weeds which were there to have been a view obstruction a person would have to be lying on the ground. The poles and posts are scattered and could not hide a moving train and the signal shack would be a view obstruction only for the driver of a standing vehicle if the train also were standing still in one certain location, and then only if the vehicle were very close to the track and the train were a long distance away. Whatever it might mean that the signal house "was a constant blinder for the previous 10 feet at height of 9 feet", page 13 of the brief. it is obvious the poles and weeds and signal shack are no view obstruction to a driver of a moving vehicle at night approaching and passing the stop sign of a brightly lighted train 600 feet to the west. Exhibit 22 clearly demonstrates this, as well as Exhibits 21, 6 and 14, and appellees' witness Wood, so testified.

The attempt to establish Leaper's testimony about the noise he heard as positively being that of screeching tires will not succeed. if it be remembered that he was not outside and all he testified to was that he heard a noise which sounded like tires screeching. The rest of the testimony of Mrs. VanEngelen and Wood and Mrs. Nichols and the train crew will establish that Leaper is wrong about screeching tires and that this noise really was the last imperative blast of the whistle from the train, commenced about when the train was passing the Nichols house and which Mrs. Nichols definitely heard and remembers. The distance fits well with what Fletcher, the engineer, said was the place where he first saw Nelson and saw he was not stopping for the stop sign. Leaper, in fact, positively testified he heard whistle signals prior to that time - and he was appellees' witness. The positive testimony of appellees'

witnesses is that whistle signals were given at a time when, if heeded by Nelson, the accident would have been prevented. In such a situation, Idaho holds there is no negligence in the sounding of signals, even if less than one-quarter of a mile. Ineas v. Union Pacific R. Co., 72 Idaho 390, 241 P. 2d 1178. We come back, again, to the sole proximate cause of the accident being the act of the intoxicated driver failing to stop for the stop sign. Even if we assume what counsel on pages 14 and 15 wishes the Court to think, that the screeching noise was caused when Nelson stopped and then speeded up, the only reasonable conclusion would be that Nelson was trying on icy streets to beat the train to the crossing!

Appellees seek to bring in evidence which was not admitted in the case. For instance, on page 8 in point 4 they say there was no stop sign and that this was "a busy urban stop street", although the evidence is there were no cars on Alpine Street and none approaching the crossing from the north and only three cars were shown to be going north on Roosevelt; on page 31 they say traffic "regularly used" the crossing; on page 33 they say Roosevelt is a "high traffic" street; on page 41 they say this is a "busy urban grade crossing"; yet all testimony as to traffic conditions other than at the time of the accident was correctly kept out of the case.

#### Crossing Not Extra-Ordinarily Hazardous

Appellees would have this court believe the view here is such that one could not use the crossing without danger. They are disturbed that the view from the stop sign is so good and have tried to disparage the panoramic photographs, have said the engineer couldn't see the stop sign from 600 feet away, whatever that has to do with the case, and have kept repeating over and over as if repeating it would make it true,

that from the stop sign to the tracks, a distance of about 100 feet, the view at the crossing is such that the crossing is dangerous and obstructed. Appellees' Exhibit No 6 was taken around 600 feet from the street and was taken with an automobile stopped at the stop sign. This photograph shows that a driver when stopped can see the train if it were at the location of the camera, that prior to that point and just past it a driver would have as good or better view and that if the vehicle stopped at the intersection itself in relation to the stop sign on Alpine which can be seen clearly in the photograph, view toward the train would be entirely unobstructed and open. Appellees' own evidence is entirely along the line that a driver at the crossing can see a train for over 1/4 a mile, and that Mr. Wood actually did see this very train at such a distance and could at the time tell it was a train and that he had time to cross ahead of it.

The obstructions on the west as a motorist approaches the tracks are not such as to make the crossing extra-ordinarily hazardous to use. In fact, there is about 100 feet when vision to the west is almost totally unobstructed so that by the exercise of ordinary care a driver may use the crossing safely. Because of the stop sign, which requires motorists to stop at such place as would eliminate the effect any obstructions might have, appellants urge that the physical circumstances at the crossing had no effect whatsoever upon the accident and did not play any part. Nor did these circumstances impose upon appellants any other or different standard of care than usually applied at railroad crossings. The crossing was dangerous on the night of the accident because of two facts or conditions - there was ice on the street making it slick, and Nelson drove through the stop sign without stopping and without obeying the very



traffic control device which would have prevented the accident. Thus, it was his act, possibly coupled with the road conditions - for neither of which appellants can be charged - which caused the accident. Appellants could do nothing to prevent the collision when Nelson failed to stop at the sign where the engineer had every right to believe he would stop.

#### Negative Whistle Evidence Does Not Raise Issue

It is not just being in the area where whistle signals could be heard and not remembering them which creates an issue about whistles. That is purely negative testimony and as indicated by Ralph v. Union Pacific R. Co., 82 Idaho 240, 351 P. 2d 464, is not the type of testimony which will raise an issue. Rather, as was said in the old and mainly discredited Fleenor case quoted by appellees at great length, and on page 24 of their brief, it is only when witnesses are "looking and listening for the train and were in a position near the track where they could see and hear equally as well as other witnesses" that negative testimony will raise an issue. In this case, only the testimony of Wood could possibly raise such an issue, but he made a contrary statement at an earlier time, Exhibit No. 32, and at no time offered any explanation or justification for speaking out of both sides of his mouth. It was not his testimony that he listened for whistles and heard none, but only that he thinks if they were blown, he would have heard them. Yet, appellees' own witness, Leaper, testified both as to hearing whistles and to hearing, immediately after, a screeching sound or sounds. Wood said he did not hear such screeching, but we assume appellees would not want to say that this was evidence there was no such sound. Obviously, Wood's testimony is not sufficient to raise any issue about what was or was not

being sounded at the crossing. His attention was directed to other things, since he knew already about the presence of the train.

Superceding, Independent Negligence of Nelson Caused Accident

While appellees will admit, at the bottom of page 26, that Nelson was negligent, they say there is no evidence "he knew the train was coming until it was too late by virtue of the lack of control over his car" (emphasis added). This admission establishes the point we have been trying to make all along, that the accident was the result of Nelson failing to control his car instead of the result of any acts or omissions on the part of appellants. The controlling reason that Nelson failed to know about the train until too late was that he failed to obey the law and stop at the stop sign which he was required by law to do whether or not a train was coming. Had he stopped in compliance with law, he would have discovered the presence of the train.

Appellees refer at the top of page 27 to two cases which appellants did not cite but which tend to support their position. The Court is invited to look at one of these, Shelite v. Chicago, Rock Island and Pacific R. Co., 10th Cir., 307 F.2nd 49. It establishes that a passenger can be contributorily negligent by failing to look and to warn the driver, and where the evidence reasonably shows that the passenger failed to exercise such care, there is no cause of action. The facts here are that if Catherine Jarrett warned Nelson he ignored the warning and failed to stop for either the train or the stop sign. The facts here are not consistent with her having warned Nelson but are consistent with the existence of contributory negligence on her part.

Appellees have tried at this late date to raise a presumption of due care on the part of Catherine Jarrett. However, the trial court



specifically did not give an instruction on the presumption and, indeed, it would have been against Idaho law so to do. Domingo v. Phillips, 87 Idaho 55, 390 P.2d 297; Mundy v. Johnson, 84 Idaho 438, 373 P. 2d 755. We will not discuss the matter any more because it is not an issue in this case, having neither been raised by the pleadings nor instructed on by the court nor raised as a point on appeal by appellants.

The lengthy references to Valles v. Union Pacific Ry Co., supra, and Miller v. Union Pacific Ry. Co., 290 U.S. 227, 54 S.Ct.172, 78 L.ed. 285 by appellees indicate they confuse the contentions being made by appellants relative to proximate cause with the separate and undisputed rule relating to joint or concurrent negligence. Appellants are raising no point that the acts of appellants and the negligence of Nelson cannot be joined in the action, but rather are contending that the admitted, established and gross negligence of Nelson was an independent, intervening proximate cause causing any acts or omissions of appellants to become merely conditions leading up to the fatal event. For that reason, there is no reason to distinguish Valles and Miller. The point we raise is illustrated by the case of Ranstrom v. Oregon Short Line R. Co., D.C. Idaho, 18 F. Supp. 256, where the action by a passenger was dismissed because the negligence of the occupants of the car was an intervening, independent cause.

In that connection, appellees referred to 52 Am. Jr., Sec. 112, page 452 to the effect that there can be joint liability for separate tortious acts, but the same section on page 453 says:

"If the tort of each defendant is several when committed, it does not become joint because afterwards its consequences unite with the consequences of several other torts committed by other persons in producing losses. The rule of absence of joint tort liability has been regarded

as particularly supportable where there is no concert of action or common intent, and the acts are separate as to time and place, but in some cases it has been regarded as applicable even though the torts of the persons involved were simultaneous and precisely similar in character."

Thus, the question here is whether a railroad company and the engineer of a brightly lighted train which is whistling and which can be clearly seen for the last 100 feet from a stop sign to the tracks are to be held joint tortfeasors for an accident which results when an approaching driver who is intoxicated runs the stop sign on slick and icy streets and drives in front of the train without making any effort to stop. Surely, there can be no doubt that when the driver ran the stop sign, any prior acts of negligence on the part of appellants, if any, had ceased to have causative effect and nothing they then could do would prevent the accident.

While appellants do not dispute the joint and concurrent tort rule and thus need not review the several cases cited by appellees on pages 28 through 39 on this point, we should note that the quotation set out on page 36 of appellees' brief from Olin v. Honstead, 60 Idaho 211, 91 P. 2d 380, is from the dissent. That was an action between a licensee and the landlord and the case actually holds that an earlier act of negligence was superceded and was not the proximate cause of the injury to plaintiff. This is the point being urged by appellants.

Appellees attack Hickert v. Wright, Kansas, 319 P.2d 152 on the basis that Nelson's negligence here came just a little bit later than any alleged negligence of appellants, whereas in Hickert, it was some time later. Of course, the length of time between separate acts is not material, but rather it is whether the later event superceded the legal



effect of the earlier act, whether a second earlier or a year earlier. This is well demonstrated by the Hickert case. This was a wrongful death action for a 17 year old girl brought against both the driver of the car and the parties who negligently installed a tire which failed while the vehicle was being driven at speeds in excess of 90 miles an hour. In dismissing the action against the other parties but not as to the driver, the court pointed out that the act of the driver was an independent and efficient intervening cause and quoted from 38 Am. Jur., Negligence, sec. 68, pp 724, 725 in part as follows:

"A person's negligence is not the proximate cause of an injury which results, not from the concurrence of his negligence, as an active and efficient cause, with another cause in producing the injury, but from the intervention of a new and independent cause, which is neither anticipated nor reasonably foreseeable by the person, is not a consequence of his negligence, is not controlled by him, operates independently of his negligence, and is the efficient cause of the injury in the sense that the injury would not occur in its absence. The intervention of the new, independent, and efficient cause severs whatever connection there may be between the person's negligence and the injury. . . . An act which only furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus, where a negligent act creates a condition which is subsequently acted upon by another unforeseeable, independent, and distinct agency to produce the injury, the original act is the remote and not the proximate cause of the injury, even though the injury would not occur except for the act."

As the Hickert court noted, gross and wanton negligence is an independent and efficient intervening cause producing the injury and thus becomes the proximate cause, the original act of negligence becoming remote, for which no liability attaches. In our case, the illegal act of the intoxicated driver running the stop sign on the icy streets at a crossing where an earlier driver who did exercise care could easily see the approaching train, was an unforeseeable, entirely independent act which

appellants did not control and did not cause.

"Defendant's negligence is too remote to constitute the proximate cause where an independent, illegal, willful, malicious, or criminal act of a third person which could not reasonably have been foreseen, and without which such injury would not have been sustained, intervenes."

65 C.J.S., Negligence, Sec. 111, pp. 699-700.

In the case of Shepard v. Thompson, 153 Kansas 68, 109 P.2nd 126, a judgment for the wrongful death of a passenger was reversed. There was no evidence that the passenger ever had given the driver any warning of the train which was in plain view while there was yet time to avoid the accident, and the court held that a guest or passenger in an automobile is under a duty to exercise reasonable care and precaution for his own safety and "he cannot recover damages if he fails to exercise such precaution and to give warning to the driver of an imminent danger". The court noted that there was no evidence the passenger did or did not give any warning, but because the train and the physical conditions could be seen as well by the passenger as by the driver, the court held the passenger had to be guilty of negligence on his own part. This is the same point we have been making in connection with Catherine Jarrett. Regardless of what appellees may speculate on about what went on inside the car, there is no question the stop sign was visible and well known to these two residents of the area, that they knew of the crossing, that the train could be easily seen from the vicinity of the stop sign and that the car failed to stop there and failed to approach the tracks so it could be stopped on the slick streets if a train were coming. Only two conclusions can be drawn concerning the actions of Catherine - either she warned Nelson and he failed to stop and use care, or she did not look, listen



or warn him. In either event, her own negligence bars her. Yearout v. Chicago, M.St.P. & P.R Co., 82 Idaho 466, 354 P.2d 759, establishes that the contributory negligence of Catherine Jarrett is a defense to this action.

### Controlling Fact in Case is the Stop Sign

The matters of speed of the train, presence or absence of whistle signals and what the view was prior to reaching the stop sign all became insignificant and of no legal effect when Nelson ran the stop sign and drove in front of the brightly lighted, plainly visible train which was, at that time, in hazardous proximity to the crossing. His actions were illegal, were negligence per se being in violation of several statutes set out in the appendix of appellants' opening brief and plainly were the independent, intervening proximate cause of the accident, as this court should rule as a matter of law.

A case having a great deal to say bearing upon the issue here presented is L. & N.R. Co. v. Fisher, (Ky.), 357 S.W.2nd 683. While it involved a daytime accident, much else is similar to our case. Tall weeds and vegetation were alleged to obstruct view until a motorist was at the stop sign at a railroad crossing. However, between the sign and the track upon which the train was approaching, trains could be seen readily. The Kentucky court found no negligence on the part of the railroad and instead treated the stop sign as being "of controlling significance", p 686. There were no eye witnesses to the accident and no skid marks, just as in our case, and also some of plaintiffs' witnesses heard whistle signals. The court decided the case entirely upon the fact there was a stop sign which permitted the motorist to see if it were safe before trying to cross the tracks, holding that failure to exercise such care is



negligence as a matter of law.

"In our opinion, no reasonably prudent motorist may justifiably ignore the warning of such a stop sign on a highway. To do so is to engage in a form of Russian roulette". P. 690.

If he did not obey the stop sign, the court said, it is negligence as a matter of law which constituted the sole proximate cause of the accident; if he did obey the stop sign, but continued "his subsequent conduct can only be explained as complete carelessness" See page 21 of appellants' opening brief for further quotation from this case. Since this is one of the few crossing cases involving stop signs, it should be very persuasive to this court. As the Kentucky court says, the existence of a stop sign is controlling.

#### Damages are Excessive

Unless there are no guide lines whatsoever and unless any verdict returned by a jury will be upheld, the verdict in this case is too high. There are no Idaho verdicts even near it and there is nothing in the record upon which to base such a large sum. The limiting phrase in the Idaho wrongful death statute which should permit this Court to look at the circumstances, is that jury awards shall be "just". Justice requires a balance of interests, and while the jury has the duty of fixing the amount of damages, nevertheless in Idaho that process is subject to review, and the precedents from this Court are that this Court will examine a verdict and reduce the amount where it is not just.

While prior verdicts are not controlling, they are indicative and an appellate court should not abdicate its proper function of supervision and close its eyes to anything a jury does, but should exercise its undoubted power to reach justice and reduce verdicts which are as

greatly excessive as the one in this case. Covey Gas & Oil Co. v. Checketts, 9th Cir., 187 F.2nd 561.

While Catherine Jarrett was shown by the evidence to be a very nice child, likely to be married soon and away from home as her older brothers and sisters, the only justification for the award here is "comfort, society and companionship". This is a pretty high price tag for those commodities, when never before in Idaho has there been such an award, when there is not even the element of lost "contributions which the parents might reasonably have expected to receive from the earnings of the deceased during his minority". Checketts v. Bowman, 70 Idaho 463, 220 P.2nd 682. If this requirement of the Idaho law of damages is observed, it is plain the award here is "too high".

Certainly, a jury may range far and wide in its determination of an award, but as appellees admit, there may not be any award for grief and anguish. Hepp v. Ader, supra. The value of the society, companionship and comfort of a 14 year old girl who will soon be away from home certainly, when viewed realistically and in the light of every day experience, isn't the hour by hour, day by day loss the advocates of the more adequate award urge for let us say, the loss of a husband and wage earner. Yet, this is the only justification for an award of this size here and when counsel for appellees says, as he does on page 56 of his brief, "That what Catherine's parents had missed about her was a daily experience. This will continue. The loss since her death has not diminished", what he is saying is that the parents grieve for their child and their grief is a day by day thing which has not diminished since the accident. We all know, from the experience of losing loved ones, that the loss of society and companionship and comfort tend to diminish. They may

never disappear, but they diminish, and to give an award of \$60,000.00 for one of eight children to a family whose status is such that the award must very nearly exceed the annual net income of the father projected over his entire life expectancy, is shocking. Unless we are prepared to say there are no limits at all to a jury award for an untalented, ordinary 14 year old girl, similar to the limits for the loss of an adult husband and father wage-earner, this comparison should point up the extreme nature of the award.

What is this award but the punishment of a drunken driver? Yet, the Railroad Company which just happened to be there when this grossly negligent driver ran a stop sign in front of a train, is tarred with the same brush. Correcting this injustice and reversing as to the Railroad Company and Mr. Fletcher will leave intact the judgment of \$60,000.00 against the person who caused it, since that part of the judgment is final.

To justify this grossly excessive Idaho award, counsel first states that awards in other jurisdictions are not of much help, and later says "making book" - whatever that means - on other awards from other jurisdictions can not accomplish much, but then cites several awards in other jurisdictions to compare with this one. Royal Crown v. Bell, 111 S.E. 2nd 734, is not a case which likely will appeal to most lawyers. It is a travesty. Blisard v. Vargo, 6th Cir., 286 F. 2nd 169, does not give any indication whether grief and anguish are permitted items of damage in Michigan, but Mann v. Bowman Transportation, Inc., 4th Cir., 300 F. 2nd 505 does so indicate. The words omitted by the three asterisks in the portion quoted on page 64 of appellees' brief are:

"But who could say as a matter of law that this father experienced no grief, no sorrow, no wounded feelings, no mental shock and suffering. . ."



Sandifer Oil Co. Inc. v. Dew, 71 So 2nd 752 involved the death of a terribly burned 14 year old girl who lived just under 100 hours in excruciating pain and the award here was based upon punitive damages. Even so, the dissenting judge felt the award far exceeded "rational total of compensatory and punitive damages". While no punitive damages officially are involved in our case, there is little question when comparing the award to others made in Idaho that the element of punishment looms large.

Mock v. Atlantic Coast Line R. Co., 87 S.E.2nd 830 involved an award allowing recovery for "mental shock and suffering, wounded feelings, grief and sorrow...", page 836. The reviewing judge felt the award to be "wholly disproportionate to the measurable damages sustained", but the court refused to set aside the award under South Carolina practice.

While appellees would like the court to believe that lower awards are representatives of an ancient and archaic age, the same is not true. See page 30 of appellants' opening brief. The various rules concerning damages for deaths of minors set out in the annotation referred to by appellees in 14 A.L.R. 2nd 550 are so varied and confusing relative to the permissible elements of damages as to be of no value whatsoever. However, reference to the decided cases will demonstrate the complete error in appellees' contention that remittiturs rarely are warranted. As in Idaho, the unusual or out-of-line awards such as this one generally are reduced and only in rare circumstances permitted to stand, usually where other factors exist. The cases referred to in the opening brief will indicate that modern cases are not calling for higher awards than older cases and that in this day as in any other day and age, courts

will reduce awards which are excessive and unwarranted.

Conclusion

So should it be done in this case. Appellants submit that under the evidence and the law, appellants were not shown to be negligent so as to be the proximate cause of the accident and judgment should be entered on their behalf upon reversal by this court; or, secondly, if that is not done, then there should be a new trial or at least a reduction in the amount of the excessive award.

Respectfully submitted,

BRYAN P. LEVERICH

E. C. PHOENIX

D. A. BYBEE

F. L. RINGE

Attorneys for Appellants.



Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in compliance with those rules.

E. C. Phoenix

Attorney for Appellants

Service of the foregoing brief made by mailing three copies thereof to Bruce Bowler, 244 Sonna Building, Boise, Idaho, 83702, attorney for appellees, on February \_\_\_\_\_, 1967.

E. C. Phoenix

Attorney for Appellants















